

1 UNITED STATES OF AMERICA  
2 NUCLEAR REGULATORY COMMISSION  
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5 PUBLIC MEETING REGARDING THE NRC HEARING PROCESS  
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10 U.S. NRC

11 11555 Rockville Pike

12 Commission Hearing Room

13 Rockville, Maryland  
14

15 Tuesday, October 26, 1999  
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18 The above-entitled meeting commenced, pursuant to  
19 notice, at 8:46 a.m.  
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## P R O C E E D I N G S

[8:46 a.m.]

CAMERON: Good morning, everybody, and welcome to the NRC's public workshop on potential revisions to the NRC hearing process.

My name is Chip Cameron, and I'm the Special Counsel for Public Liaison here at the Commission, and I'm happy to serve as your facilitator for today's meeting.

As all of you know by now, the Commission issued a staff requirements memorandum that directed the staff to evaluate potential changes to the Commission's hearing process and procedures and to develop a draft proposed rule on that subject for Commission review.

The Commission has directed the Office of General Counsel to evaluate what changes should be made to the NRC hearing process, and the Commission also believed that it would be useful to get some early public perspectives on these issues.

So, consequently, we have asked the group around this table and the audience to be with us today to have a discussion on hearing process issues, and in a few minutes, we're going to go around and do some introductions, but we do have a impressive, and I would say, intriguing group of people around the table representing various affected interests that are affected by the Commission's hearing process, and the General

1 Counsel hopes that, through a dialogue among all of you, that  
2 there will be some good information developed that she can then  
3 use to proceed with drafting this proposed rule, identifying  
4 what are the problems, are there any problems, what are the  
5 options for addressing those problems, and what are the  
6 advantages and disadvantages of those various options, and as  
7 your facilitator, I'm going to try to help you do a couple of  
8 things over the next day-and-a-half.

9           One is to keep the discussion relevant and focused  
10 and not only relevant to whatever particular agenda topic that  
11 we're on at the time but also to try to help you develop  
12 discussion threads so that we don't just jump from one  
13 unrelated point to another, that we try to tie some of these  
14 points together.

15           Secondly, I may ask you to clarify your statement so  
16 that everybody understands the rationale behind a particular  
17 statement that you make.

18           I will try to keep track of any recommendations or  
19 action items that are developed as part of this discussion,  
20 hopefully keep us on schedule, and finally, make sure that  
21 everybody had a chance to talk, and in that regard, our ground  
22 rules are simple for this discussion.

23           If you want to speak, if you could just turn your  
24 name tent up on end like that, and I'll keep track of that, and  
25 that way, you won't have to keep your hand in the air, keep

1 raising your hand, and also, it helps to have only one person  
2 speaking at a time.

3           It will allow us to get a clean transcript. Jon is  
4 our stenographer over there, and he's been through this drill  
5 before, and he does know who you are in terms of where you're  
6 sitting, but at least at the very beginning, if you could just  
7 state your name for the transcript when you talk.

8           Not all of the points that are going to be made are  
9 going to fit squarely within the agenda item that we're dealing  
10 with.

11           So, I'll try to keep track of things that come up  
12 that we might want to revisit later on in the process, and the  
13 focus of the discussion is down here at the table, but we also  
14 do want to hear from the audience, and so, we will be going out  
15 to those of you in the audience who want to comment at the end  
16 of each major discussion topic.

17           What I'd like to do now, before we get into an agenda  
18 overview -- and I have one suggested change that I want to  
19 explore with you.

20           I thought it might be useful at this point to have  
21 everybody introduce themselves, and if you could just give us  
22 your name and affiliation and one or two sentences on what your  
23 interest or concern in this particular process is, and what I'm  
24 going to do is I'm going to start with Paul Bollwerk, who's  
25 chairman of our licensing board panel.

1 Paul?

2 BOLLWERK: My name is Paul Bollwerk. I'm am the  
3 Chief Administrative Judge with the Atomic Safety and Licensing  
4 Board Panel, the Commission body that handles the agency  
5 adjudications both for licensing and enforcement actions, and  
6 my interest here is, obviously, seeing there's a fair and full  
7 hearing process that's put together.

8 CAMERON: Why don't we go to Tony?

9 ROISMAN: I'm Tony Roisman. I'm with a law firm in  
10 Vermont -- Christianson, Carter, Scott, McGee. I've not been  
11 involved in nuclear licensing matters for a long time, and I  
12 guess I'm here on a historical preservation task.

13 LUBBERS: I'm Jeffrey Lubbers. I teach  
14 administrative law at Washington College of Law, American  
15 University. Before that, I was -- for about 12 years, I was a  
16 research director at the Administrative Conference of the  
17 United States, looking at administrative procedure reform  
18 issues.

19 HEIFETZ: I'm Alan Heifetz. I'm the Chief  
20 Administrative Law Judge at the Department of Housing and Urban  
21 Development. I've worked with Professor Lubbers at the  
22 Administrative Conference. I was a member for nine years and  
23 was the chairman of a group that drafted model rules of  
24 practice and procedure for administrative agencies.

25 I also have heard and decided cases for 19 different

1 departments and agencies of the United States Government, not  
2 including the Nuclear Regulatory Commission.

3 CURRAN: My name is Diane Curran. I'm a lawyer with  
4 the law firm of Harmon, Curran, Spielberg & Eisenberg. For  
5 almost 20 years, I've been representing citizen groups and  
6 state and local governments in NRC licensing cases.

7 I'm very interested in preserving what fairness  
8 remains in the NRC licensing process, and I feel like I've -- a  
9 little bit like I've been invited to plan my own funeral today.

10 ZAMEK: I'm Jill Zamek. I'm with the grassroots  
11 group, citizens group, Mothers for Peace, in California, and  
12 I've used the -- well, we've used the hearing process over the  
13 years, and so, I'm interested to see what changes you're  
14 planning.

15 CAMERON: Okay. Thanks, Jill.

16 MURPHY: I'm Mal Murphy. I'm the Regulatory and  
17 Licensing Advisor to the Nye County, Nevada, Nuclear Waste  
18 Repository Project Office.

19 So, obviously, my principle interest is the potential  
20 application of any changes in the licensing process to the  
21 high-level waste repository, but I'm interested in the rest of  
22 the process, as well. Principally, my focus will be on the  
23 high-level waste issue.

24 CAMERON: Okay. Thanks, Mal.

25 Mike?

1           McGARRY: I'm Mike McGarry. I went to the dentist  
2 this morning, so I've got novocaine on the side of my mouth.  
3 I'm with the law firm of Winston & Strawn. I have practiced  
4 for a number of years before the Nuclear Regulatory Commission,  
5 tried cases with Tony Roisman, Diane Curran, and like Paul  
6 Bollwerk, I'm interested in a fair administrative hearing  
7 process.

8           KOHN: My name is Stephen Kohn. I'm here with the  
9 National Whistle-Blowers Center, and I'm an attorney, and I've  
10 represented whistle-blowers in nuclear facilities for a number  
11 of years, and intervenors in licensing proceedings.

12          HIATT: My name is Susan Hiatt. I direct the Ohio  
13 Citizens for Responsible Energy. We have been intervenors in  
14 the operating license proceeding for the Perry nuclear power  
15 plant in Ohio. My interest is in trying to preserve a fair and  
16 meaningful process for public participants.

17          RICCIO: Good morning. My name is Jim Riccio. I'm  
18 the staff attorney for Public Citizen's critical mass energy  
19 project. Public Citizen has brought several lawsuits against  
20 the NRC and the industry, and I'm here to see that our rights  
21 are protected.

22          SILBERG: I'm Jay Silberg, a partner at Shaw Pittman,  
23 Washington law firm, and representing licensees in NRC hearings  
24 and AEC hearing since 1969, and before that, for a years, with  
25 the Atomic Energy Commission, and our purpose here is to try to

1     assure that the Commission's procedural rules are both fair and  
2     efficient for all parties.

3             BACKUS: I'm Bob Backus from New Hampshire. I'm a  
4     lawyer with the law firm of Backus, Meyer, Solomon, Rood &  
5     Branch, and along with Tony Roisman, I spent years and years in  
6     the licensing process over the Seabrook plant and in subsequent  
7     licensings, as well.

8             I'm currently writing a history of that, calling  
9     Seabrook the Parrot Victory. I think the subtitle is going to  
10    be "We Told You So," and I'm still representing clients that  
11    may appear in NRC licensing hearings.

12            THOMPSON: My name is Tony Thompson. I'm a partner  
13    at Shaw Pittman. I represent mostly uranium recovery  
14    licensees. I'm here on behalf of the National Mining  
15    Associations Uranium Recovery Environmental Subcommittee, and  
16    I'm primarily focused on preserving or making sure that the  
17    informal hearing process is fair and efficient.

18            GINSBERG: I'm Ellen Ginsberg. I'm Deputy General  
19    Counsel of the Nuclear Energy Institute. Prior to that, I was  
20    a law clerk when Tony was litigating the Comanche Peak case,  
21    law clerk for the NRC at the Atomic Safety Licensing Board  
22    Panel, and I represent the industry's overall interest, and our  
23    interest is ensuring that the NRC implements a fair and  
24    efficient process to resolve the legal and technical issues  
25    that come before it.



1           EDGAR: I'm George Edgar. I'm a partner in the law  
2 firm of Morgan, Lewis & Bockius. I represent nuclear  
3 licensees, and I, too, am here to see that the process, if  
4 changed, is fair, efficient, and effective.

5           GRAY: I'm Joe Gray, Associate General Counsel for  
6 Licensing and Regulation at the Nuclear Regulatory Commission.

7           Some years ago I was a hearing attorney and hearing  
8 division branch chief. Since then I've been in various  
9 positions in the Commission and most recently the current one.

10          In this current position, our division will be  
11 working on any rule-making that results from these discussions  
12 and the Commission's desire to re-examine the hearing process.

13          CHANDLER: I'm Larry Chandler. I'm Associate General  
14 Counsel for Hearings, Enforcement, and Administration.

15          Since 1972, I've represented the staff or I've been  
16 responsible for the representation of the Commission staff in  
17 all administrative proceedings relating to the licensing of  
18 reactor facilities and litigation related to materials  
19 licensing and enforcement proceedings.

20          Like Joe, we're interested in assuring that any  
21 regulatory changes move in the direction of assuring a full,  
22 fair, and effective and efficient process for the development  
23 of a sound record from which Commission decisions can be drawn.

24          CAMERON: Okay. Thank you all, and thank you for  
25 taking your time to be here today and a half-day tomorrow, and

1     what I'd like to do now is just go over the agenda and perhaps  
2     suggest one change to you on the agenda, and bear with us.

3             The microphones -- the audio is not really working,  
4     but we have sent for someone to come down and help us out with  
5     that.

6             Luckily, the stenographer can hear, and I hope all of  
7     you can hear around the table, but we'll try to improve this so  
8     that the audience can hear this.

9             When we put together the agenda, we not only tried to  
10    make sure it covered all of the important issues in some sort  
11    of logical sequence but also to try to ensure that it didn't  
12    reflect any bias in terms of a particular result that we want  
13    to -- or that the NRC wants to come out of this particular  
14    meeting, and we hope that it doesn't reflect any bias.

15            We're going to get started this morning with a little  
16    bit of context from Larry Chandler on just an overview of the  
17    NRC hearing process, and we do want that to be a context and  
18    not really to spark our discussion at that point, but if there  
19    are some clarifying questions that you want to ask Larry at the  
20    end of that, we can take those.

21            We were then going to move into a presentation by  
22    Professor Jeff Lubbers from American University on emerging  
23    issues and addressing the degree of formality in agency  
24    adjudication.

25            Now, you'll notice that, if you look, after the

1 break, we were going to get started in our first discussion  
2 area with what do we want to see come out of a hearing process?  
3 What are the objectives that we want to achieve?

4 And this probably does you no good at all, since you  
5 can't read it, but it is part of Attachment 3, it is in  
6 Attachment 3 to the SECY paper, and this was an attempt to lay  
7 out what some of the performance goals or objectives of the  
8 hearing process might be, and our opening discussion is going  
9 to be to talk about some of those goals or performance  
10 objectives.

11 Are those the correct ones? Do we want to add  
12 anything to those? Are there conflicts between those goals,  
13 and how do we go about trying to resolve trade-offs between  
14 these various objectives?

15 The two items right after lunch are going to start to  
16 get to this issue of how do we characterize a formal process  
17 versus an informal process, and the agenda change that I  
18 thought might be useful was, rather than having Jeff Lubbers at  
19 9:30 this morning, is to put him on before we get to the 1:15  
20 and 2:15 items.

21 In other words, he's going to be talking about  
22 informal and formal processes, and I thought that might be a  
23 useful introduction to those items.

24 Does anybody have any problem with doing that shift?  
25 It's okay with Jeff.

1 [No response.]

2 CAMERON: Okay. Well, we'll do that, and when  
3 Larry's done, we'll take some questions, and then we'll go into  
4 the objectives of the hearing process, and then we're going to  
5 have Jeff Lubbers, with his presentation, and we'll see how we  
6 do in terms of the time slots for these.

7 Then we'll go into the 1:15 and 2:15 sessions in that  
8 sequence, and this afternoon, at 3:30, we take -- try to marry  
9 these items in terms of how do the formal and informal  
10 processes meet these objectives that we're talking about, and  
11 you can see we have some questions after each of these items to  
12 try to stimulate some discussion, and we're going to try to get  
13 -- we'll get out of here about 5:15 today, and then, tomorrow  
14 morning, we're going to come back and see if we can do a  
15 summary of that, how do informal and formal processes compare  
16 to the objectives that we talked about?

17 At 9:30 tomorrow, we're going to get to a discussion  
18 of is a particular process more appropriate for one type of  
19 hearing than another?

20 We heard Mal talk about the fact that he's interested  
21 in the high-level waste proceeding.

22 Tony talked about the types of proceedings that he's  
23 usually involved in, so that we'll explore that particular  
24 issue, and the last issue is, apart from trying to come up with  
25 new, informal processes, are there changes that should be made

1 to the Commission's hearing procedures, generally, that would  
2 result in fairness, efficiency, any of these other goals, and  
3 some of you are going to have to, I know, be out of the room at  
4 particular times to do various things.

5 In other words, some people are not going to be here  
6 for the whole day-and-a-half, but I think that there's enough  
7 of a feedback loop between all of these different discussion  
8 items so that, if you have a major point that you want to make  
9 it's going to get into the discussion and on the record today.

10 So, with that, are there any questions on the agenda  
11 or any comments on the agenda before we get started?

12 Yes. Steve?

13 KOHN: Yes. You sent to us, just recently, about a  
14 week ago, I guess, the July 22nd memo.

15 CAMERON: Steve is referring to the -- I believe --  
16 the Commission -- what's called the staff requirements  
17 memorandum that was issued in response to the SECY paper,  
18 99-006, that was sent up.

19 Yes. Go ahead.

20 KOHN: And is the meeting here today limited to a  
21 discussion of the rule-making aspect, or is there going to be  
22 discussion on the legislative aspect? This says there's going  
23 to be legislation.

24 CAMERON: Let me say a few words about that, then I  
25 will see if Larry Chandler or Joe Gray want to say anything.

1           In the Federal Register notice that announced this  
2 meeting, there was a statement in there that we were not going  
3 to focus on the -- what I call the scope of authority issue for  
4 a number of reasons, one of which is we're not sure that  
5 whatever proposed rules that come out of this -- we're not sure  
6 that there will be implications for the scope of authority  
7 issue.

8           Secondly, we didn't think that there would be -- it  
9 would be really productive to spend a lot of time debating the  
10 scope of authority issue versus talking about some of the  
11 policy issues of concern here.

12           So, that is not going to be a topic for discussion.

13           That doesn't mean that, if any of you want to make a  
14 statement at some point about your belief on that particular  
15 issue, that it's inappropriate for you to put that on the  
16 table. That would be fine. It's just that it doesn't seem  
17 that there's much usefulness in having a discussion on that.

18           If it remains an issue when the proposed rule comes  
19 out, then there will be plenty of opportunity to offer a full  
20 exposition of whatever your feelings are on that.

21           KOHN: Just so I understand where we're at, this  
22 discussion essentially assumes that there's no right to an  
23 on-the-record hearing, that the Commission essentially, through  
24 existing authority or through this legislation, will have  
25 almost complete discretion on setting up whatever hearing

1 procedures it wants, and we're here to essentially give input  
2 into that discretion that the Commission will exercise. Is  
3 that essentially what's happening?

4 CAMERON: I would say that the Commission is looking  
5 for -- and I don't mean to dismiss or not emphasize the scope  
6 of authority issue, but the objective is to focus on the policy  
7 aspects of it and to assume suspend disbelief, even though you  
8 can offer your opinion on it, that the Commission does have the  
9 authority to do it, and I would ask, Larry or Joe, do you have  
10 anything to add to that?

11 GRAY: Only that I think we should assume, for  
12 purposes of discussions around here, that the Commission has  
13 broad discretion to fashion appropriate processes and  
14 procedures for hearings and focus on what kind of processes and  
15 procedures should it look to, as opposed to questions about the  
16 authority.

17 KOHN: And just for the record, our participation  
18 here does not mean we agree with that legal position.

19 CAMERON: Yeah. And let's put a real fine point on  
20 that, that we don't look at anybody's participation here as  
21 agreeing with that particular statement that Joe made, okay?

22 Any other comments on that particular point?

23 [No response.]

24 CAMERON: Okay.

25 Anything else on the agenda generally, before we get

1 started?

2 [No response.]

3 CAMERON: All right.

4 Well, let's turn it over to Larry for sort of an  
5 overview on the NRC hearing process, and then we'll take some  
6 questions, and then we'll move into a discussion of objectives.

7 Larry?

8 CHANDLER: Looking around the table, it's sort of  
9 clear that I can go through my presentation in, I think, a  
10 rather brief way.

11 Most of you, many of you, at least, have had  
12 experience before the Commission in formal proceedings, what we  
13 refer to as formal proceedings, and many of you, as well, in  
14 informal proceedings, and what I'd like to do in the next  
15 couple of minutes is just, from a very generalized and high  
16 level, present sort of broad distinctions in the way the  
17 Commission has approached its various adjudicatory licensing  
18 and enforcement processes.

19 I don't plan to get into real detail about the  
20 procedures that are involved.

21 I don't plan to get into how the Commission's various  
22 policy statements may affect the implementations of the --  
23 implementation of the Commission's regulations, really just  
24 sort of to set the stage in a very -- as I said before --  
25 generalized way about how we might proceed in the future.



1 I'd refer all of you again to what I consider at  
2 least to be a pretty good discussion of the Commission's views  
3 on its hearing obligations, which is found in its decision back  
4 in 1982, in the Kerr McGee/West Chicago proceeding.

5 That's at -- I think it's Attachment 1 to the staff  
6 papers, that SECY 99-006, where the Commission lays out from  
7 both an Atomic Energy Act and constitutional standpoint its  
8 views on what its obligations are in terms of conducting  
9 various types of proceedings, formal and informal, relative to  
10 the different kinds of licensing activities that it engages in.

11 As I'm sure most, if not all, of you know, the  
12 Commission historically has used a rather formal type of  
13 process in connection with licensing, especially licensing  
14 reactor facilities.

15 It's very much a courtroom type of adjudication.  
16 It's had the full set of trappings commonly associated with  
17 courtroom trials.

18 It involves a motion practice, discovery through the  
19 use of depositions, interrogatories, request for document  
20 production, opportunities to seek summary disposition,  
21 presentation of testimony by live witnesses and cross  
22 examination of witnesses, submission of post-hearing submittals  
23 such as findings of fact, conclusions of law, opportunities for  
24 oral argument, in a framework in which literal adherence to  
25 rules of evidence is not mandate.

1           The process starts, I suppose -- it establishes a  
2   pretty high threshold for participation, and that's an area, I  
3   know, that many of you have spoken to over the years in  
4   different ways.

5           It requires not only establishing conventional  
6   standing but the submission of intentions to demonstrate that  
7   there exists a genuine issue of material fact such that a  
8   hearing, an adjudicatory hearing, is truly warranted.

9           In addition, the process includes an appellate  
10   process.

11          For many years, that included an intermediate review  
12   stage before a three-member Atomic Safety and Licensing Appeal  
13   Board as a matter of right, prior to an opportunity to request  
14   a discretionary or certinary type of review before the  
15   Commission.

16          That intermediate step, the Atomic Safety and  
17   Licensing Appeal Board panel, was abolished in stages, I guess,  
18   actually, commencing in about 1990, but other than that the  
19   process has remained unchanged to this point today.

20          In the mid-'80s, the Commission, in response to the  
21   Nuclear Waste Policy Act of 1982, promulgated a new set of  
22   regulations.

23          Limited in scope, they apply to spent fuel storage  
24   proceedings.

25          Those regulations are found in sub-part K to 10 CFR

1 Part 2, as opposed to the other proceedings I was alluding to  
2 earlier, which are in sub-part G.

3 Those procedures, the sub-part K procedures, have  
4 been invoked, as far as I can recall, actually only twice, and  
5 I think only now, in one proceeding, are being implemented  
6 fully. The first proceeding was terminated rather abruptly a  
7 number of years ago.

8 Sub-part K is a hybrid process.

9 It's essentially -- my characterization would be a  
10 summary disposition process within the envelope of a sub-part G  
11 proceeding, based on oral argument, with written facts and data  
12 in support of that, which is designed to identify the issues on  
13 which there truly are genuine and substantial disputes which  
14 require resolution through adjudication.

15 In the later 1980s, the Commission concluded that the  
16 formality that it generally associated with hearings related to  
17 reactor facilities was not necessary in connection with all its  
18 proceedings, and I think, again, that Kerr McGee discussion  
19 gives you a pretty full picture of the Commission's thinking on  
20 that, and in 1989, the Commission developed what it refers to  
21 as an informal hearing process, and that's a question I think  
22 we'll spend some time over the next day or so talking about,  
23 informal hearing process, which is found in sub-part L.

24 Unlike the sub-part G process, which is conducted  
25 before a three-member Atomic Safety and Licensing Board,

1 sub-part L proceedings are conducted before a single presiding  
2 officer, today often assisted by a technical assistant.

3           These are, for all intents and purposes, a paper  
4 proceeding.

5           The NRC staff may or may not be a party to them.  
6 Contentions are not filed but, rather, the requirement is that  
7 the parties, an intervenor, identify not just standing but  
8 areas of concern, a more generalized standard, and it's  
9 generally a lower threshold for admission.

10           Discovery is replaced by the compilation and  
11 distribution of something referred to as a hearing file, which  
12 the staff puts together and provides to all parties and to the  
13 presiding officer.

14           Examination and cross-examination of live witnesses  
15 is replaced by the submission of written presentations by all  
16 parties, and rebuttal submissions, as well, often in various  
17 stages.

18           Sub-part L does permit for more formality if the  
19 presiding officer determines it's warranted.

20           It can include the submission of proposed written  
21 questions which would be propounded by the presiding officer.

22           It could even call for the presentation and  
23 examination of live witnesses if, again, the presiding officer  
24 determines that it's necessary for the development of an  
25 adequate record.

1           The sub-part L procedures are now used in connection  
2 with material licensing proceedings, reactor operator licensing  
3 proceedings, and would be used in connection with reactor  
4 licensing proceedings following permanent cessation in  
5 operation and removal of fuel from reactor facilities.

6           Again, typically in connection with reactor cases and  
7 enforcement cases, the more formal sub-part G procedures  
8 continue to apply.

9           Most recently, the Commission developed a new hearing  
10 process, which again is limited in scope. It's essentially to  
11 be used in connection with license transfer proceedings.

12           These procedures, these new regulations, are found in  
13 sub-part M to 10 CFR Part 2.

14           Procedures were laid out in recognition of the  
15 narrower scope of the issues that are relevant to the transfer  
16 proceedings, as well as a recognition of the desire for  
17 improving the efficiency of the licensing process and taking  
18 advantage of the flexibility the Commission has to device  
19 suitable procedures with due regard for the due process rights  
20 of the parties and in the interest of providing a fair and  
21 efficient process to all participants, members of the public,  
22 applicants and licensees alike.

23           The procedures in sub-part M provide for a more  
24 direct and active role by the Commission at the outset.

25           In fact, it contemplates the Commission would be the

1     presiding officer unless it designates otherwise and expects  
2     that the Commission would be very involved in delineating  
3     case-specific procedures, perhaps schedules, to assure the  
4     expeditious conduct of these proceedings.

5             It retains essentially the high threshold that you  
6     find in sub-part G in terms of the submittal of contentions,  
7     but like the sub-part L proceeding, the sub-part M process does  
8     not mandate participation of the NRC staff, although it does  
9     explicitly provide that the staff safety evaluation will be  
10    offered through sponsoring witnesses in any proceeding.

11            Again, much like a sub-part L proceeding, discovery  
12    is much more limited. In this instance, however, it's confined  
13    to something called a hearing docket, which is maintained by  
14    the Secretary.

15            Hearings are generally expected to be oral hearings,  
16    although if the parties agree, they can be conducted solely on  
17    the basis of written presentations.

18            Proposed cross-examination would be submitted to the  
19    presiding officer, who is charged with conducting examination  
20    of witnesses at a hearing, and of course, if the Commission  
21    determines that it's appropriate and necessary, it can order  
22    additional procedures, including, in fact, conducting  
23    proceedings under sub-part G.

24            That, in a nutshell, I think, are the main procedures  
25    that are available.

1 I've avoided getting into the sub-part J processes  
2 which relate to the high-level waste proceeding. They don't,  
3 in large part, pertain to the actual conduct of the proceeding,  
4 and so, I have not gotten into those.

5 Anybody that's got any other thoughts or  
6 contributions to that, just -- again, to sort of set the stage  
7 for where we'll be going.

8 CAMERON: Are there any questions for Larry about  
9 that context that he provided?

10 Bob?

11 BACKUS: If the system does not change, which of  
12 those sub-parts would the Commission be using most of the time,  
13 would you think? I mean where is most of the Commission's  
14 business these days? Obviously it isn't for construction  
15 permits. So, where is the bulk of the process going to go in  
16 these various sub-parts as you see it right now?

17 CHANDLER: I think, if you look at the current cases  
18 that we see coming in, we have a fairly substantial number of  
19 cases coming in in enforcement cases which are sub-part G cases  
20 and I think would probably most likely continue to be more  
21 formal types of proceedings in the future.

22 In addition, we see some number of reactor license  
23 amendments come in. Under current practice, those are sub-part  
24 G, formal procedure-type cases.

25 We see a small number of reactor operator licensing

1 cases come in. Those are sub-part L formal processing --  
2 informal process, and we see some reasonable number of  
3 materials licensing proceedings come in. Those are sub-part L,  
4 as well.

5 The very large part of what we're seeing coming in  
6 today is under sub-part M in connection with license transfer  
7 proceedings. We haven't had all that many contested.

8 We are seeing an increased number of those come in,  
9 and I think we've seen a couple of recent decisions in that  
10 regard in connection with, more recently, the Seabrook,  
11 Millstone cases.

12 CAMERON: Okay. Let's go to Susan and then we'll go  
13 to Alan.

14 Susan?

15 HIATT: There's something that is, in my view,  
16 missing in this whole agenda, and that is a demonstration of a  
17 need for change.

18 I am reminded of the adage of folk wisdom, if you  
19 might, that you should not try to fix that which is not broken,  
20 and I have not seen, either in the SECY paper or even a place  
21 on the agenda, for a determination that the process is so  
22 deficient right now that it needs such fundamental revision. I  
23 would like someone to address that.

24 CHANDLER: I'll give you a thought on that.

25 I'm not sure that -- you used the word "fundamental"



1 revision. I'm not sure that you need to think of this and our  
2 discussions as being driven by a need for wholesale,  
3 fundamental change, as opposed to a fresh look at the  
4 procedures that we currently have and thoughts and suggestions  
5 as to whether those procedures should be changed, can be  
6 changed, and if so, how, to assure that all participants in  
7 this process, various processes, are afforded an efficient and  
8 fair opportunity to contribute to a decisional record from  
9 which licensing action decisions can be based.

10 I don't think they're foregone conclusions, I don't  
11 think there's a pre-ordained outcome to the process, save for  
12 the direction to really take a hard look at what we've been  
13 doing and how we've been doing it. I mean that's the way I  
14 tend to read it.

15 CAMERON: Let me suggest -- I think this is going to  
16 be a useful initial discussion topic, is there a need for  
17 change, and it leads us right into the objectives or  
18 performance goals, and let's get some -- let's get the  
19 questions out of the way and then go into this is there a need  
20 for change discussion.

21 Ellen, did you have something on that?

22 GINSBERG: Mine is in the nature of an answer,  
23 actually. The question was asked about what hearings are we  
24 anticipated being -- where the concentration of hearings is  
25 going to be held, and I didn't hear you say license renewal,

1 and the industry has lined up -- I think there are 22 or so  
2 plants scheduled that have been announced for license renewal,  
3 and those will be, potentially, available for hearings.

4 CHANDLER: That's correct, and that's a sub-part G  
5 formal proceeding.

6 CAMERON: Okay.

7 Steve, did you have a question, or did you want to  
8 get off on Susan's topic?

9 KOHN: You predicted it, but the -- I agree -- I  
10 think the issue here really comes down to license renewal.  
11 Anyone who's watched the process over the last 10 years --  
12 there have been some licensing proceedings, but license  
13 renewal, taking the plant from a 40-year to a 60-year  
14 life-span, with all of the issues of the operating history of a  
15 plant and potential discovery and hearings into how that 20- or  
16 30- or 40-year operating history may impact on renewing it for  
17 another 20 years -- I think the industry wants to eliminate  
18 licensing hearings as formerly known for the renewal process,  
19 and the Commission also wants to eliminate it, because the  
20 Commission wants to encourage license renewals, and any  
21 operating plant that undergoes a license renewal process risks  
22 discovery into their current operation and into how that  
23 current operation will impact on future operation.

24 That's really what's happening. If it wasn't for the  
25 push for license renewal, this meeting would not be happening,

1 and my major concern is that the very reasons why the AEC  
2 wanted on the record formal hearings in the 1950s, if anything,  
3 has increased numerous times in the types of issues that should  
4 be litigated in the renewal context, and that's why the whole  
5 discussion about how to make it less formal and give the public  
6 less rights -- what really needs to happen is there needs to be  
7 a formal discussion on how to increase public participation,  
8 and that's where this agenda should be moving.

9 For example, discovery: Well, why aren't the  
10 operating records of an existing plant made more fully open and  
11 accessible? All the types of logs and the minutia that real  
12 experts would need to look at to see if a plant should have a  
13 license renewal.

14 So, I view the direction that the Commission has  
15 clearly set as a matter of policy the absolute wrong direction,  
16 and I think that's really why this whole debate is happening.

17 CAMERON: I think that we're getting launched into  
18 this discussion, and I know there's going to be some comments  
19 on that particular point.

20 So, unless there's any questions of clarification for  
21 Larry on this -- and I just would remind even the NRC folks to  
22 use their cards. There's no dispensation for you people.

23 Why don't we explore Susan's question in terms of is  
24 there a need for change?

25 I think I hear Steve suggesting, among a lot of other

1 things, that perhaps the motivation for this is license  
2 renewal.

3 I don't want to, you know, put any words into his  
4 mouth, but let's have a discussion on that, and I would ask our  
5 guests who are here from a more neutral standpoint, Alan and  
6 Jeff, maybe you have some comments from your experience with  
7 either other agencies or your agency about what usually sparks  
8 the need for prompting change in these types of procedures.

9 Jay, are you going to go to this? Is there a need  
10 for change? Okay.

11 SILBERG: There are really two points that I'd like  
12 to make on the need for change.

13 First is that there have been, historically, in  
14 recent history, a number of NRC licensing cases that have been  
15 held up as how not to do it, cases that ran on interminably,  
16 that didn't reach decision either for or against, where issues  
17 were held over for long periods of time, case studies on how an  
18 adjudicatory process of any stripe should not operate.

19 I think that's one reason for why a change needs to  
20 be looked at.

21 The second reason that I'd note is that the  
22 Commission's hearing process has begun to grow.

23 Larry outlined a number of different procedural  
24 options that are now in the rules, but no one, I think, has  
25 really sat back and taken a hard look at why does one have this

1 kind of procedural steps but another doesn't, do we really need  
2 all of these different formats, have they been done in a  
3 coherent and thought through in a logical, coherent way?

4 It seems as if a particular need has arisen or a  
5 particular congressional bill has provided an opportunity to  
6 create a unique mechanism, but no one has sat down from first  
7 principles and figured out how the hearing process ought to  
8 work, and I think this is a good opportunity to do that.

9 We don't have now a large number of pending cases as  
10 we did in the '70s and the '80s. So, I think this is a good  
11 time, perhaps, to take a break, take a breather, step back, and  
12 look logically at what ought we have to have as the hearing  
13 process.

14 CAMERON: Okay. Thanks, Jay, and I want to try to  
15 see if we can follow up on that last point.

16 Of course, the first point you made is important, but  
17 your second point suggests that maybe this is an opportune time  
18 to take a look at the hearing process that has just been --  
19 there's been various procedures grafted on over the years, and  
20 perhaps that's where these performance objectives come in, is  
21 to take a look at the existing hearing process through that  
22 lens of those performance objectives.

23 Does anyone want to comment on Jay's point about the  
24 hearing process has grown and it's time for a change at this  
25 point?

1 Diane?

2 CURRAN: I would be curious to know what plants are  
3 on Jay's list of cases that didn't work, and it's certainly  
4 been my observation that one of the cases perceived by the  
5 industry and some members of Congress has not having worked was  
6 the Louisiana Energy Services case, where a citizens group  
7 effectively prevailed, and some very complex issues were raised  
8 and litigated before a licensing board.

9 The licensing board took longer than the Commission  
10 and the applicant would have wished to decide, but it was in  
11 the hearing phase that the issues were really put to the test,  
12 and my observation has been that there's been tremendous  
13 fallout from that, that there's a perception that the public  
14 should be involved up to a point but not to the point where it  
15 could actually have an effective voice in the outcome of a  
16 licensing case.

17 I am one who very much favors the formal proceedings  
18 for licensing for the sole reason that there is a very uneven  
19 playing field in a nuclear licensing case.

20 All of the information, the relevant information, is  
21 generally in the hands of the company and the NRC staff, and to  
22 simply say, well, let's put a hearing file in the public  
23 document room, very selective process that doesn't allow the  
24 citizen group to get at the kind of detailed information that  
25 can actually allow that group to be an effective participant in

1 the licensing decision.

2 I think the hurdles for the admissibility of  
3 contentions are one way that the Commission has tried to limit  
4 the effectiveness that intervenors can have. The very tight  
5 time-frames on the amount of time that one gets to prepare  
6 one's case is another big problem.

7 The lack of completeness of the application when the  
8 case is docketed for hearing, which puts a tremendous burden on  
9 the intervenor to be constantly amending its pleadings in order  
10 to stay in the case -- these are all very burdensome measures  
11 that the Commission has instituted in order to limit the  
12 effectiveness of intervenors in formal proceedings.

13 Nevertheless, on the other side of the ledger, there  
14 is the opportunity for discovery of important information.

15 In spite of all the difficulties in participating in  
16 a formal licensing hearing, in that case, a citizen group was  
17 able to use the process to really bring issues before a  
18 licensing board and get a favorable determination from the  
19 licensing board, and at least one of those was upheld by the  
20 Commissioners.

21 I feel that it's completely uphill to participate in  
22 a formal adjudication at all, that the Commission has pushed  
23 the public to the absolute margin of effective participation in  
24 an NRC licensing case, but to go beyond that and to render the  
25 proceedings completely informal and deprive the public of that

1 access to information would make it not worthwhile to even  
2 participate in most of these cases.

3 CAMERON: Okay. We're going to get to that last  
4 point, obviously, is going to be the heart of our discussion.

5 Now, there was a question that Diane posed to Jay,  
6 and I don't know if Jay has an answer for it.

7 SILBERG: I'll be happy to answer it.

8 CAMERON: One point for the group is that -- Diane  
9 brought up a couple of points that I think go to these  
10 objectives again. In other words, more information needs to be  
11 disclosed.

12 I suppose that that fits under the transparency  
13 performance objective, or maybe we need to add to the  
14 performance objectives.

15 She talked about the existing contention standard  
16 really not being a model of fairness.

17 Again, I'm trying to link to these performance  
18 objectives, but before we go to Jay, Diane, would you agree  
19 that, from the perspective of these two points that you brought  
20 up, you would think that there should be some changes to the  
21 hearing process or procedure in perhaps this regard. Would  
22 that be correct?

23 CURRAN: Yes.

24 CAMERON: Okay. Good. So, there are some  
25 suggestions from a point of view of a couple of different



1 performance objectives that we might talk about in terms of  
2 change.

3 Let's let Jay give his comment to Diane, and then  
4 let's go to Joe Gray and Jim Riccio and then over to Tony.

5 Jay?

6 SILBERG: Yeah. Diane's correct. I mean the LES  
7 case is certainly one of the ones that we think was not a model  
8 of how cases should be done. It wasn't the fact that the  
9 result at the licensing board level, at least, was unfavorable.  
10 It's the fact that the case took seven years under a system  
11 that Congress enacted to make cases go quickly.

12 And the other case was the license transfer case for  
13 Southern Nuclear.

14 Now, if one goes back a little bit to the end of the  
15 operating license regime, we also had a number of cases that  
16 were very difficult to bring to conclusion, you know, Seabrook,  
17 Shoreham, Comanche Peak.

18 There are lots of aspects of any of those cases that  
19 one can look at, some of which work, some of which doesn't --  
20 didn't, and I think if you want to draw lessons learned, you  
21 have to look at each one of them and see what went wrong, what  
22 went right, and try to draw the lessons accordingly.

23 CAMERON: Jay, you're suggesting that we need to put  
24 a finer point on some of these examples of cases that, quote,  
25 "didn't work," unquote, to see what exactly was wrong, to get

1 away from the standpoint of the belief that people have,  
2 perhaps, that you think that -- people think they're flawed  
3 only because the result was the opposite of what a particular  
4 interest wanted to see.

5 SILBERG: Correct.

6 CAMERON: Okay.

7 Let's go to Joe, and then we'll go to Jim and Tony,  
8 then we'll come over here to Jill and Steve and Susan.

9 Go ahead, Joe.

10 GRAY: I want to get back to Steve's point about  
11 motivation for change.

12 I don't know what the motivation was, but I do think  
13 that the Commission has looked at the pilot procedures that are  
14 in place, and picking up on Jay's point, we've got sub-part G,  
15 sub-part J, sub-part K, sub-part L, sub-part M. We've got also  
16 a 10 CFR Part 110, sub-part I, for export licensing hearing  
17 processes.

18 There are a lot of procedures. There are a lot of  
19 specific processes that have been -- have accreted over the  
20 years, and all of them tend to be -- to make hearing processes  
21 expensive and burdensome for a lot of people, including the  
22 public participants.

23 I think that the Commission is looking for a way to  
24 simplify some of this, to make it more effective, and to  
25 possibly make it more accessible, but looking for all of your

1 suggestions about how to do that, and if it turns out that part  
2 of the motivation is an anticipation of a number of certain  
3 types of proceedings down the road, license renewal  
4 proceedings, so be it, but I think the ultimate aim was to look  
5 for a more efficient and effective process.

6 CAMERON: I guess what you're saying, Joe, is that  
7 the implication behind Steve's point, I guess, on license  
8 renewal is that the motivation is only to expedite things, and  
9 you're saying that there's a broader -- from your perspective,  
10 and you're giving your opinion about the Commission's  
11 perspective -- is that there's a broader --broader objectives  
12 at work here.

13 GRAY: Right.

14 CAMERON: Let's go to Jim, and then we'll go to Tony,  
15 and then we will go down to Jill and back over this way.

16 Jim?

17 RICCIO: I would really have no problem in revisiting  
18 this whole process if it wasn't my belief that we're basically  
19 going to result in circumscribing the public's rights even  
20 further and that this is just another series of attempts to  
21 circumscribe the public's rights.

22 You've already removed our right to a hearing  
23 post-licensing. You're trying to close your meetings behind  
24 doors and under the Sunshine Act, and I just wanted to pull out  
25 something back from the early '80s, when I was still in

1 college.

2 Peter Bradford said that the current NRC adjudicatory  
3 process was developed as part of a bargain in which the nuclear  
4 power industry gained a great deal in the late '50s.

5 In return for accepting extensive Federal hearings,  
6 the industry was exempted from any state or local regulation of  
7 radiological health and safety and received limitations on  
8 liability set forth in the Price-Anderson Act.

9 Thus, citizens in any community where the nuclear  
10 facility was located gave up both local regulation of the  
11 facility and additional financial and safety assurances that  
12 normal insurance industry operations would have brought.

13 In return, they got a commitment of a full panoply of  
14 trial-type proceedings as part of the Federal licensing  
15 process.

16 Now that memories have faded, the industry is seeking  
17 to revoke its share of the concessions in that original  
18 bargain.

19 And he went on to comment that, contrary to the  
20 popularly held belief that the hearing process had prohibited a  
21 timely resolution of issues, that -- there's a letter here from  
22 -- basically from former Commissioner -- or Chairman Palladino  
23 saying that he has no evidence of this holding up.

24 I know Jay has mentioned the LES, and I would suggest  
25 that the industry avoid bringing up the Vogtle licensing

1 transfer case, because if anyone takes a good hard look at  
2 that, what they'll find is that the reason that license  
3 transfer took so long is because a whistle-blower who is a  
4 former executive at Southern challenged the license transfer,  
5 and why?

6 Because his people had told him to lie about the  
7 reliability of the emergency diesel generators.

8 I don't think that's a real strong case for you all  
9 to be bringing up, because when you really look at it, it shows  
10 that -- a lack of hearing process rights actually hurt the  
11 public and it came close to melting down a reactor in Georgia.

12 Basically, this is all about knocking down the power  
13 lines leading in to plant Vogtle.

14 But to say that we're here merely to, you know,  
15 reform a process that doesn't work -- the public doesn't  
16 believe the process works.

17 We're minimized and basically driven to, as Diane  
18 says, the fringes of the process, and to think that we're going  
19 to come in here and get a fair shake from this Commission -- I  
20 really think you have to take a step back and ask yourselves,  
21 you know, what do you want?

22 Do you want to give us hearing rights, or do you want  
23 people meeting you in the streets?

24 I did a small survey, rather unscientific, of the  
25 people that I work with. Their comments were you take away our

1 hearing rights, we will meet you in the street. Ask the  
2 Commissioners how they would like a tent village on the White  
3 Flint green.

4 These are people who have used the process. These  
5 are people who are currently using the process in dealing with  
6 decommissioning and license transfers.

7 CAMERON: Okay. Thanks, Jim. You raised a couple of  
8 important points, one of which I'm going to ask Larry to  
9 address, but this is just sort of a courtesy point for you in  
10 terms of processes. I think, for most of us, we don't need to  
11 be reminded that you were in college in the 1980s.

12 RICCIO: Sorry, Chip.

13 CAMERON: Larry, Jim was, I think, expressing a view  
14 that -- Joe talked about a number of reasons why -- that  
15 there's a re-look going on, and I think Jim evidenced some  
16 skepticism about the objectiveness of the process, is there a  
17 particular result that is being looked at here. Do you want to  
18 comment on that?

19 CHANDLER: I think I said earlier, sometime ago,  
20 that, in my view, there is an interest in looking honestly at  
21 the broader question of how a process -- how the current  
22 processes are working and whether the current processes can and  
23 should be improved to result in a better and more effective and  
24 efficient process to make decisions.

25 I don't share his cynicism for the process. I think,

1 on the contrary, it's worked reasonably well over the years.

2           It's had its high points and its low points, as any  
3 process will, and we can identify cases -- I've been identified  
4 with cases that I think have gone well and some which,  
5 candidly, have not gone especially well in terms of anyone's --  
6 from anyone's perspective.

7           I think, in, in part, response to some comment that  
8 Steve Kohn made a bit earlier, I think one of the things we  
9 need to do when we think about how the process works and  
10 whether how it could be improved, what the objectives of the  
11 process need to be relative to the different things the  
12 Commission does, the different kinds of actions the Commission  
13 takes, the process doesn't really act in isolation.

14           The hearing procedures really need to be designed to  
15 achieve certain points and objectives.

16           In the context of -- the historic context of reactor  
17 licensing proceedings, for example, you have a series of  
18 findings that are dictated in 10 CFR Part 50, and the question  
19 then becomes what kind of processes are best used to enable  
20 those determinations to be made when they are contested?

21           When you look at license transfers, as the Commission  
22 did recently in promulgating sub-part M, questions were asked,  
23 given the nature of the determinations that are needed in  
24 connection with license transfers, what processes will work  
25 well in reaching those?

1           Likewise, in connection with license renewal, the  
2 Commission determined the scope of findings needed to authorize  
3 issuance of a renewed license. Those are in Part 54. And  
4 again, the question becomes what processes, procedures are  
5 appropriate to making those kinds of findings. And enforcement  
6 cases, likewise, and you can go through and ask the same  
7 question.

8           I'm not suggesting that you need to have unique  
9 procedures for each and every kind of finding and determination  
10 the Commission needs. I'm just suggesting that it's an  
11 appropriate consideration as we talk about any revisions to  
12 existing processes, and in fact, it explains, in part, how some  
13 of these decisions were made over the years and why these  
14 sub-parts have evolved the way they have.

15           CAMERON: Okay. Thanks.

16           We're going to go to Tony and then to Jill, and I  
17 guess one question -- one issue for people to think about is  
18 that, if there is skepticism about where the Commission is  
19 headed in this -- with this re-look, how do you dispel that  
20 skepticism?

21           Is it only results-oriented solution, or are there  
22 process, including this process, that can help convince people  
23 of that?

24           Tony?

25           THOMPSON: The Commission engaged in a strategic



1 assessment re-baselining initiative under Chairman Jackson that  
2 looked at all of its overall regulatory processes to determine  
3 what -- where they might go in the future, what were the  
4 issues, what were important.

5 I see no reason why looking at a hearing process that  
6 has been grafted together over 20 years or 30 years isn't an  
7 appropriate part of such a process.

8 The uranium recovery industry determined that there  
9 were a whole range of Commission policies or decisions or  
10 approaches to regulating uranium recovery industries that had  
11 been cobbled together over 20 years and presented a white paper  
12 to the Commission raising these issues, suggesting that now is  
13 the time for a fresh look.

14 It seems to me that makes sense for any agency at  
15 some point in time to consider whether what they're doing now  
16 can be improved. Perhaps it can.

17 Skepticism goes two ways. I've been a part of a  
18 proceeding, informal hearing proceeding for the lowest risk  
19 single type of process in the nuclear fuel cycle that's  
20 involved 10,000 pages from intervenors, most of it totally  
21 repetitious, interlocutory petitions for re-hearing, voicing  
22 exactly the same thing as in the briefs, and that's an abuse of  
23 the process from our perspective.

24 So, perhaps there is a need to look at all sides of  
25 these issues, and I don't claim to be all knowing, but it seems

1 to me it makes perfectly good sense to take a look at things  
2 and see if there is a way to perhaps not have so many different  
3 sub-parts, maybe wind up saying that's what you're going to do.  
4 Maybe you keep them the way they are. Maybe you tweak them.  
5 Maybe you don't change things fundamentally. I don't know.  
6 But it's certainly worth looking at.

7 CAMERON: Okay. I think that ties into what Jay was  
8 saying, that it may be time for a re-look.

9 I know we're going to get some response to your  
10 second point, which is a criticism of a particular proceeding  
11 and type of proceeding, and I think what we're seeing develop  
12 is that, just as Jim indicated a different view on the Vogtle  
13 license transfer, that there may be a different view about what  
14 to some person is a defect and may not be a defect to someone  
15 else.

16 Jill?

17 ZAMEK: I have a lot to say.

18 One is why are we second-guessing the Commissioners  
19 about their motivation? One idea is it's for license renewals,  
20 and my idea was the waste repository issue. Why are we making  
21 this change to make it less formal right now?

22 I want to talk a little about my experiences, getting  
23 in as a citizen into a license renewal case. It's already  
24 extremely difficult to get in, with standing and contentions,  
25 and then we can't talk about generic issues.

1           So, it's already -- your hands are tied from the  
2 start, and I think we need to go more in a direction like -- I  
3 agree with Steve Kohn. It's like we're going in the wrong  
4 direction and not less formal.

5           Although it simplified the process and allowed more  
6 people to come in the process, I think that what's going to end  
7 up happening is the process will be completely ineffective.  
8 That's my fear.

9           So, maybe we can allow more contentions in, maybe  
10 more people can participate, but then it's going to just get  
11 flushed down the toilet. Okay, we looked at that, we didn't  
12 find any basis, and throw it away, and what's our recourse.

13          So, I don't think simplifying the process is the  
14 answer.

15          CAMERON: Okay. Thanks, Jill, and we're certainly  
16 going to get to those substantive issues about whether  
17 simplifying the process is the answer, and I guess, similar to  
18 Steve, you're thinking that there is a particular proceeding  
19 that's a motivation or type of proceeding that's a motivation  
20 for the hearing.

21          ZAMEK: Whether it is or it isn't isn't really the  
22 point.

23          CAMERON: Okay.

24          Mal, since Jill mentioned high-level waste  
25 proceeding, do you want to go ahead, and then we'll move to

1 Susan and then Steve, then Mike.

2 MURPHY: Well, I wasn't going to say anything about  
3 the high-level waste proceeding.

4 I will later, but I just would like to make the  
5 suggestion that perhaps we're hung up -- and I, you know, sort  
6 of thought of this when I was reading the SECY paper, and  
7 earlier than that, when the Commission asked for comments on  
8 the formal versus informal hearing process with respect to the  
9 proposed Part 63.

10 These, in a small sense, at least, are sort of buzz  
11 words, and the word "informal" hearing really freaks people out  
12 in many contexts, not just nuclear licensing but in the whole  
13 gamut of regulatory hearings.

14 There's lots of members of the public who are  
15 unsophisticated with respect to regulatory matters and who  
16 don't participate in the regulatory process the way some  
17 representatives of the public do who are just convinced that,  
18 when they hear the word an "informal" hearing, that the result  
19 has been cooked, and in some cases, history has proven them  
20 right, unfortunately, and not, again, with respect to nuclear  
21 matters, but just as a suggestion, I would think we might be  
22 better off for the next day-and-a-half talking more about how  
23 do we reduce the complexity -- I don't like the word  
24 "simplification" either, but how do we reduce the complexity of  
25 the whole hearing process, how do we move toward reaching these

1 performance objectives, and I guess, at some point in time, we  
2 have to talk about them specifically, in a way which serves the  
3 interests of all the parties -- the public, the industry, you  
4 know, state and local governments, for my case, etcetera --  
5 rather than just saying, well, you know, shouldn't we have some  
6 hearings as formal, some hearings as informal?

7 I don't think that's the real issue, and I think that  
8 word "informal" with respect to complex, scientific, highly  
9 technical, highly emotionally charged and controversial  
10 hearings is frequently counterproductive in terms of public  
11 perception.

12 CAMERON: Okay. Thanks. And I think we may hear  
13 some more about that when we hear Jeff Lubbers' presentation,  
14 but I think your point is a good one in terms of trying to move  
15 towards the performance objectives at some point.

16 Let's hear some more comments around the table. I  
17 think that this is useful in terms of people getting out some  
18 basic thoughts here.

19 Susan?

20 HIATT: I just wanted to respond to Jay's examples of  
21 cases that didn't work and those that had a lot of delay  
22 involved in them.

23 I guess it all depends which side you're looking  
24 from.

25 From the perspective of the citizens being placed at

1 risk by the nuclear industry, for them, delay is a victory.

2 Every day the facility isn't operating is a day  
3 they're not being placed at risk, and for them, it's a  
4 perfectly legitimate goal, and I would just note that this  
5 agency, when it suits its own purposes, has also seen delay as  
6 a legitimate strategy, the most recent example of which was its  
7 decision on potassium iodide funding.

8 CAMERON: Okay. Thank you, Susan.

9 Steve?

10 KOHN: Thank you, Chip.

11 I just want to say one thing initially. I just want  
12 to thank Chip for doing this.

13 I was a little skeptical coming in, but I've really  
14 been enjoying the discussion, I think, hearing from the  
15 different sides and getting a real feel for this. I hope the  
16 whole day continues. I'm finding it very stimulating and  
17 interesting.

18 I would like just to focus on a couple of the  
19 comments I heard and hope to have a reasonable conclusion, but  
20 someone made a comment that, over the last 20 years, there's  
21 been a lot of changes in the rules and maybe it's time now to  
22 change the rules or look at reformatting them because of, you  
23 know, all these different sub-parts and make it  
24 administratively more efficient, and I just sit back and say  
25 there's about 500 years, really, we're looking at in terms of

1     how do you get truth in a process, and as our forefathers knew  
2     when they fought for the Magna Carta and other doctrines, the  
3     adversary system works. Cross-examination works. Neutral  
4     judges with true independence work.

5             If parties, through consent, can agree upon some form  
6     of alternative dispute resolution process, fine, but when push  
7     comes to shove, when you have two very adversarial interests,  
8     the adversary system, as it has been hammered out and achieved  
9     through a number of revolutions and the historical process,  
10    works, and I think where we see the tension here is certain  
11    efforts to take away those rights, such as meaningful  
12    cross-examination that needs discovery, that doesn't have  
13    judges do the cross-examination, that advocates do it, and I  
14    will say, in the context of good science, without meaningful  
15    cross-examination, you are living in a very dangerous  
16    situation.

17            I've had the honor of representing scientists at the  
18    FBI and I've had the honor of representing scientists at the  
19    EPA on all sides of the spectrums, and one thing we have  
20    learned, that on questions of science, without good  
21    cross-examination and discovery, you will have tremendous  
22    problems.

23            Example in the FBI context, the World Trade Center or  
24    the Oklahoma City bombings, where witnesses in World Trade took  
25    the stand and were not subject to proper cross-examination,

1       terrible science was occurring. You need the time, you need  
2       the experts to deal with that, and that's a fight they're  
3       having in EPA today about more openness in the process in terms  
4       of good science.

5               So, we should not look at certain procedural rights  
6       that have proven effective in the truth-seeking process. Those  
7       rights must remain sacred, and we shouldn't confuse efficiency  
8       with taking away cross examination. The two are in totally  
9       different ballparks.

10              Which brings me to the Vogtle case, which has been  
11       used as an example. I've been told it's been used as an  
12       example on a number of occasions. I've never been invited, on  
13       any occasion in which it's been used as an example, to offer  
14       any form of rebuttal, but for the record, I'll just offer it  
15       here.

16              I had the honor of representing that whistle-blower  
17       in the Vogtle proceeding, and what happened there was just  
18       cross-examination at work.

19              The proceeding which we thought would last a short  
20       period of time went on for a long time, because anything we did  
21       but because the company's witnesses were putting bad science on  
22       the stand.

23              We had an expert who could properly assist in  
24       cross-examination and demonstrate material issues at that  
25       plant, root cause problems, safety issues.



1                   So, that process worked.

2                   What didn't work at Vogtle was the non-adjudicatory  
3 process, the process in which the public had been pushed out,  
4 which caused the adjudicatory process to go longer.

5                   The staff delayed the investigation for years. They  
6 had the information in '90. It took them three years to write  
7 a report. It didn't take us three years to do a hearing.

8                   Two level one violations were issued with no effect.  
9 Level two violations were issued with no effect.

10                  So, if you have a utility that is essentially immune  
11 from being disciplined through the staff process, the only  
12 thing left is the adjudicatory process. Believe me, no one  
13 wanted to be there. If the staff process worked, we would have  
14 been out the door.

15                  But again, cross-examination worked, and I could go  
16 into that for a long time.

17                  I want to now deal with an issue that I think has to  
18 come to the table if this process is to work, and it's called  
19 trust.

20                  Now, we may not, in some ways, trust each other, and  
21 if we can't overcome that, it's an issue, but I'll tell you  
22 what some of the trust buzz words are for me.

23                  A discussion about less formal. The Commission  
24 clearly is not interested in less formal, or they should at  
25 least explain the contradictions.

1           An example: They've issued a policy statement that's  
2   in effect now that you should only get enlargements of time in  
3   unavoidable and extreme circumstances.

4           Less formal, to me, would mean that it might be  
5   easier to get an enlargement of time, easier for parties to  
6   work together, try to reach resolutions. Coming up with a  
7   standard of unavoidable and extreme is actually increasing  
8   formality.

9           Or the Commission's statement about board-admitted  
10   contentions in which they now say you can only have a  
11   board-admitted contention in an extraordinary circumstance,  
12   where the Commission went in a rule-making proceeding 15 years  
13   ago and found that the extraordinary circumstances standard was  
14   a threat to public health and safety.

15          So, instead of going less formal, not only did they  
16   increase formality, they increased formality using standards  
17   that threaten the public health and safety, and then they went  
18   further, because then they said, if the board has the guts --  
19   and under this standard, I doubt many will, but if the board  
20   has the guts to do a sua sponte contention, well, it's subject  
21   to immediate interlocutory review.

22          So, when the Commission is saying, on the one hand,  
23   we want less formal, but on the other hand, is mandating  
24   interlocutory review, making enlargements impossible, uprooting  
25   standards that they themselves thought were in the public

1 interest, there is a trust issue here, because you can't just  
2 get informal on the side of utilities.

3 If you're going to go informal, let's see something  
4 good coming out of it.

5 This is purely -- it's a disconnect.

6 I also want to state that the underlying issue is --  
7 someone made a comment that, I think, 22 plants were now  
8 seeking license renewal -- and there will be more, in time --  
9 22 plants seeking a 20-year renewal is the equivalent of 11 new  
10 plants going on-line.

11 It is the radiological equivalent in terms of  
12 potential exposures to the public, increasing radioactive  
13 waste, etcetera, of 11 new plants. That's what's really  
14 happening here, but with one major distinction.

15 When the 22 plants were truly new, you had the right  
16 to a formal adjudicatory process. That science could be tested  
17 through the time-honored methods of cross-examination.

18 Now, you have the equivalent of 11 plants coming  
19 on-line, but to use the word "new" is not correct, because  
20 they're not new. They're used cars.

21 So, what you're doing is you're taking --  
22 essentially, instead of these nice new machines, you're taking  
23 11 used cars out there and you're telling the public that  
24 whatever consumer protections existed in buying a new car,  
25 we're going to gut them for selling you a used car.

1           To me, this is raising a lot of safety issues, but it  
2 goes back to the trust, because what is really -- the issue is  
3 how to design our procedures to sell these used cars and  
4 eliminate consumer protection. Well, fine. Let's be open  
5 about it.

6           If the issue is really how to do a process that is  
7 fair, I think we have to hear from the Commission, and my  
8 concern is the guidance being given in this July 22nd memo. If  
9 this is what's guiding these discussions, I don't know why  
10 we're having discussions, because this is completely  
11 disconnect, and that's my concern.

12           So, to get to the trust issue, I would like to see if  
13 the Commissioners themselves would be invited to come, at least  
14 maybe for the second day of this session, give us some input,  
15 talk with us, and let's see what their motives are, as opposed  
16 to us sitting here speculating on blank pieces of paper.

17           So, for Chip, I would like to say my only  
18 recommendation is can the Commissioners be here to hear this  
19 discussion and perhaps participate?

20           CAMERON: Okay.

21           When you said "disconnect," you meant disconnect  
22 between what you saw in the SRM and an objective evaluation of  
23 what needs to be changed in the hearing process? I just wanted  
24 to clarify that.

25           KOHN: The disconnect is bringing in true public

1 participation and trying to get a just rule versus reviewing  
2 what the Commission is saying, essentially our guidance on what  
3 we're doing here.

4 There's a major disconnect, which raises a trust  
5 issue.

6 If this paper was issued, the July 22nd paper, after  
7 this discussion, that's one thing, but to come down with this  
8 type of explicit guidance before there's even the public  
9 participation, it just raises a trust issue.

10 CAMERON: Okay. So, this is going back to the point  
11 Jim made earlier, and I know that a lot of you have these  
12 concerns, and we can only harken back, I guess, to Larry and  
13 Joe's comments this morning, and we'll keep talking about that.

14 I don't know how successful we might be in bringing  
15 the Commissioners down here, but I think that the NRC has to  
16 pay particular attention to this problem about the SRM  
17 appearing to give some -- at least some type of marching orders  
18 and openness to a lot of different viewpoints here, but I think  
19 we're going to be back to that issue again.

20 Let's go Mike McGarry and then over to Tony, and we  
21 have Ellen and Jim, and then I think we'll take a break and  
22 sort of reassess where we are in terms of our next discussion,  
23 where we should start.

24 Mike?

25 MCGARRY: I think the question we need to be focusing

1 on -- is there a need for a change? Jay's given his thoughts,  
2 Larry's given his thoughts, and there's been reaction.

3 To me, there's nothing inherently wrong from taking a  
4 step back and looking at any issue. I serve on a number of  
5 charitable citizen public sector and educational boards, and  
6 I'm sure many of us in this room do the same thing.

7 We constantly are challenging ourselves. We have  
8 strategic plans. We have five-year plans. The question at the  
9 top of our minds is how can we do things better? I think that  
10 should be our focus here.

11 We have a range of issues. Jim said, look, you've  
12 taken enough away from us already, no change. Diane says a  
13 need for a level playing field. Mal says less complex hearing.  
14 Steve says trust, and he said consideration should be given to  
15 both sides, the applicants and the intervenors.

16 I think those are the types of issues we should focus  
17 on. Let's look at the issue. Can the hearing process be made  
18 to be better? I don't think the question is how can we make  
19 the process better. Can it be made better?

20 CAMERON: Okay. Thanks, Mike, and I guess that use  
21 of the word "better" brings us back to perhaps performance  
22 objectives.

23 In other words, what does "better" mean?

24 I mean there's a lot of different perspectives on  
25 that, and I think someone -- I guess it was Mal -- talked about

1 is there a way to identify problems with the hearing process  
2 and related changes to fix those problems with which a broad  
3 group of people might agree, or not agree, necessarily, but  
4 would everybody be best served by trying to pursue those  
5 changes, and let's just keep that in mind as we try to fashion  
6 an agenda for discussion for later in the day.

7 Tony?

8 ROISMAN: It seems to me that there is a basic  
9 question that we're still not really facing up to, and that is  
10 that -- I mean it's obvious from the discussion there are  
11 diametrically opposed positions and, in some ways,  
12 diametrically opposed goals.

13 There's some people in the room who want every  
14 nuclear decision to be made fast and favorably and some who  
15 want it to never be made and, if it's made, made negatively,  
16 and that's an unresolvable problem.

17 The whole reason for all these processes is to allow  
18 those two points of view to be expressed, heard, and someone  
19 independent to do it.

20 Now, obviously, there is a question that has existed  
21 even before this most recent version of the Commission, which  
22 is, is the Nuclear Regulatory Commission made up of people who  
23 are really able to be neutral?

24 They split the AEC at one time because there was a  
25 concern about the promotion and regulation getting mixed

1 together, and I'm not telling you something you don't know or  
2 revealing something that is shocking.

3           You know that the vast majority of the people who are  
4 not favorable to nuclear power plants don't believe that they  
5 can get a fair shake in front of the Commission, and they don't  
6 believe that because they look at the records of the people who  
7 are Commissioners, they look at the records of the people who  
8 are -- they're political appointees, they're appointed by  
9 presidents and by congresses, who have different agendas than  
10 the vast number of those people.

11           The hearing process, however, particularly its  
12 evolution from the time that I started with the operating  
13 license for Indian Point -- it's interesting. You can tell  
14 you're old when they start decommissioning the plants that you  
15 were opposing getting licensed.

16           But the hearing boards have really become what I  
17 think the bulk of the public always wanted the Commission to be  
18 but it really never has become. They've become the place where  
19 you can go and have a shot, have a fair shot at an independent  
20 group of people, and my experience with the hearing boards and  
21 with the -- I'm sorry that the appeal board is gone. I thought  
22 they fulfilled an enormously important function, and if there  
23 are going to be as many licensing hearings as it now appears  
24 there may be, for different reasons than the old operating  
25 license construction permit decisions.



1           I would hope that one of the things the Commission  
2 would reconsider is re-instituting that, in part to take away  
3 the burden on the Commissioners of having to decide so many  
4 detailed matters at their level and, in part, because like the  
5 licensing board, the appeal board had developed a reputation  
6 and a perception -- I mean why would all of these people --  
7 it's kind of interesting that all these people are here.

8           Why do they want this hearing process made more  
9 complete, more inclusive, more effective? Because basically  
10 there's that faith.

11           I remember a day -- I'll recount this one story,  
12 because I think it's illustrative of an important point. After  
13 many years of fighting in the Seabrook construction permit,  
14 there was a hearing before the Atomic Safety and Licensing  
15 Appeal Board, and they held it in a courthouse in Nashua, and  
16 the Clamshell Alliance had been very active at that point and a  
17 very, very effective citizen group, I might say, a model for  
18 sort of grassroots organizing, and they circled the courthouse.

19           There were, I don't know, several thousand people  
20 around the courthouse, and we were inside arguing, and when we  
21 came out, they were completely around the courthouse, and there  
22 was sort of this concern that maybe they were going to hold  
23 everybody captive, you know, the Atomic Safety and Licensing  
24 Appeal Board and everybody else, and when the Appeal Board  
25 members walked out, they opened a corridor for them, and they

1 all applauded, and they walked through, and there was that kind  
2 of a faith, that kind of a confidence in the system.

3 So, I think that the question we should be asking  
4 ourselves is really a question, all right, if there's a process  
5 there that people have faith in -- and I think they do -- what  
6 is that process for, why is it there, and I think that's the  
7 second place where there's a real divergence here among the  
8 people who are talking.

9 I think the Commissioners believe, judging by what  
10 they've written -- I know the General Counsel believes, judging  
11 by what she has written, and I suspect that many of the people  
12 at the table who are in the nuclear industry side of it believe  
13 that the purpose of the licensing process in terms of public  
14 participation is to let the public get its say and then get on  
15 with the business of nuclear power, that that is the function  
16 of it, that the public really doesn't have that much to  
17 substantively contribute to the process.

18 That's evident from Jay's listing of the plants that  
19 he considers to be the failures, and it's sort of an -- I'm  
20 glad you asked him to list those, since two of those are cases  
21 in which I was intimately involved.

22 I think, in some ways, that I would agree with him  
23 that Seabrook was a failure, but we would agree for entirely  
24 different reasons. There's a plant that should have never  
25 gotten a license. It bankrupted the utility. It's in the

1 process of bankrupting the state that I now live in, and it was  
2 a plant that was never needed and should have never been built.

3 But the point is we don't have the same view about  
4 what's a success and what's a failure. That's really  
5 important.

6 But that's because the premises between the utility  
7 on the one hand and the vendor and the regulatory staff on the  
8 other -- all the possible legitimate issues that could be  
9 explored have been explored, and all the possible legitimate  
10 facts that could be developed have been developed, and  
11 therefore, there's really nothing left for the public to do.

12 It's really a carryover of the early, early days that  
13 people -- I don't know whether there's anybody here that --  
14 even I was not around at the time when the Commission used to  
15 hold essentially a dog and pony show. They would hold a  
16 construction permit or operating license hearing.

17 The public participation consisted of people standing  
18 up and making a little speech during that process that I think  
19 has now long since gone of just -- you weren't even on the  
20 record, and questions would get raised from the floor by  
21 people, and then someone from the staff or someone from the  
22 utility would, in a very patronizing sort of way, pat you on  
23 the head and say, well, you don't understand, these nuclear  
24 power plants really can't blow up, because we're using -- we're  
25 not using that highly enriched uranium and we've got all of

1     these safety -- and so forth, and that still sort of exists in  
2     the process. That's still kind of there.

3             Now, I think that, if a real study was done -- and  
4     that's -- sort of my first principle point is that I think that  
5     this whole thing is happening before anybody has done basic  
6     scientific research necessary.

7             I was surprised, when I finally got around to reading  
8     this material, that there has been no study done of the  
9     licensing process to determine, based on real cases, not  
10    anecdotes, actual case study, how many cases work, how many  
11    didn't, why they did work, or why they didn't work, and what  
12    did it mean to say that it worked.

13            What would I put as the top list -- top of my list of  
14    the biggest failure? TMI.

15            How in the world did that plant get through this  
16    complicated, thorough licensing process with such a group of  
17    incompetent people operating it that they could not deal with  
18    an emergency situation when it arose and we nearly had the  
19    worst nuclear accident ever? How did that happen? What went  
20    wrong?

21            That's the kind of question, because that's the only  
22    issue that we really all agree on. Nobody wants a Three Mile  
23    Island. No one wants anything close to a Three Mile Island.

24            Nobody wants to find out that a plant like Comanche  
25    Peak was being built by a bunch of people who had so

1       intimidated the safety inspectors at the plant that the safety  
2       inspectors were afraid to put the safety word out. No one  
3       wants that to happen.

4               There was nobody on the side of the utility or the  
5       staff that wanted that, but it happened, and so, the test of  
6       the licensing process should be what I think is listed as item  
7       five among the five objectives, substantive soundness. Did you  
8       get a good result?

9               When you see a plant like Shoreham taken all the way  
10      to initial critical testing and then canceled, you have to  
11      wonder, where was the failure?

12              Was it in the citizens who said you shouldn't license  
13      it at all and you would have saved all that money and time and  
14      effort, or was it in the utility that said you've got to have  
15      this thing licensed and then, in the end, realized that they  
16      couldn't.

17              Now, you may object and say, well, but the reasons  
18      were political or economic and they weren't legitimately safety  
19      issues, but they're all political and economic. It all gets  
20      down to that.

21              Henry Kendall used to point out, much to the chagrin  
22      of Ralph Nader, that he was not anti-nuclear. He knew you  
23      could build and operate a plant safely, but you couldn't do it  
24      economically.

25              The reason the nuclear industry didn't want to have

1 Hyman Rickover as the Chairman of the Nuclear Regulatory  
2 Commission was obviously not because he was not pro-nuclear and  
3 it certainly wasn't because he didn't know the subject.

4           It was that, if he imposed on the private nuclear  
5 industry in this country the standards that he imposed on the  
6 nuclear Navy, very, very few utilities, if any, would ever be  
7 able to pass muster, and General Electric wouldn't be able to  
8 sell a nuclear power plant because it couldn't and wouldn't get  
9 itself down to the zero release for its nuclear fuels in  
10 boiling water reactors.

11           So, I wouldn't try, at this stage, and I wouldn't try  
12 on this day and I wouldn't try even in this year -- and I guess  
13 we can say in this century or this millennium -- to change this  
14 licensing process before somebody answers the question, what  
15 was right, what was wrong, and what failed in the system,  
16 really get a good fix on what the problem is, and secondly, to  
17 recognize that, unless there is some sort of a sea change, it  
18 is a safety reason to have citizen opponents to nuclear power,  
19 and it doesn't matter -- I don't think -- and I disagree with  
20 Steve about this -- I don't think there's an issue here about  
21 the intentions of the Commissioners.

22           I don't think that's relevant anymore than there is  
23 an issue about the intentions of Judy Jonsrud, who has been  
24 opposing nuclear power plants since before most of the people  
25 at this table were born, almost.

1 JONSRUD: I beg your pardon.

2 [Laughter.]

3 ROISMAN: My point is this is not about a question of  
4 motives or intentions. It's about outcomes.

5 I can't imagine anything that would be more useful to  
6 a genuinely concerned Nuclear Regulatory Commission and a  
7 nuclear industry than to have a group of people who were so  
8 opposed to what they want to do that they would go out of their  
9 way to find every possible flaw and defect in the proposal.

10 The last place you want to find those flaws is like  
11 they did at TMI, after the plant is running. You want to find  
12 them in advance.

13 So, I think that it's a deeper question and we should  
14 look at it from the perspective of what do you want to get out  
15 of it, and I think what you want to get out of it is this -- a  
16 process in which, to the largest extent possible, you want to  
17 have the right result.

18 Now, lastly, is that inconsistent with a process  
19 which is -- and by the way, everybody at this table agrees, it  
20 should be fair, efficient, and effective, and I don't think  
21 it's inconsistent at all, and I would candidly say I think that  
22 you can do it with, quote, "streamlined processes," I think you  
23 can do it with tight deadlines, but you cannot do it without  
24 the one thing that no one at this table except the people who  
25 are representatives of citizen groups would insist on.

1           You cannot do it if you do not fund the opposition.

2           If you look at what goes on in the licensing process,  
3 why is it -- why did we fight so hard to have cross-examination  
4 rights? Because we couldn't afford depositions.

5           When we had cross-examination rights, you put the  
6 people on the witness stand, you gave us the microphone, and  
7 someone transcribed the record, and you had to put the record  
8 into the public document room. We didn't have to buy a  
9 transcript. We couldn't afford to take depositions.

10          Do you think that we wanted to spend months, years in  
11 God-forsaken places like Ossining, New York? None of us wanted  
12 to do that. And Glen Rose, Texas.

13                   [Laughter.]

14          ROISMAN: But seriously, I think that, if the  
15 Commission wants to make the process work, then it's going to  
16 -- in a more efficient way, if it wants things to move more  
17 quickly, then it has to provide the people who are going to  
18 have the input with the resources to play the game as fast as  
19 you want the game played.

20          If you don't, then the citizens are going to say I  
21 can't run this fast, and that's what Diane was talking about.  
22 You keep -- you raise the bar higher, and you make it harder  
23 for anybody to participate unless they are well-financed, and  
24 then you say to them, we made it fair, all you had to do was  
25 get your contentions in in 10 days, or whatever, and the



1 advantage of that is that, to the extent that funding is done,  
2 it's done in a way which assures that you do not have to rely  
3 upon either no expertise or donated expertise, can really go  
4 out and find the people -- and you don't have to rely on  
5 secondary issues.

6 I discovered that the secondary issues are the  
7 easiest to understand, and I won't confess to you how many  
8 times I raised secondary issues because I couldn't understand  
9 the primary issues, but I will tell you it happens a lot, but  
10 if I had had an expert, a nuclear engineer, who would have said  
11 to me, hey, the real problem is this issue, this is the thing  
12 you should be concerned about, and was then prepared to give me  
13 testimony to that effect, I would have needed much less time  
14 and the process would have moved more smoothly.

15 Now, the outcome might have been either a denied  
16 license or a markedly changed license, but that would have  
17 served the interest, I think, of the process.

18 CAMERON: Tony, thank you for all of that, and what  
19 I'd like to do is see if we can get the cards at the table and  
20 take a break, and I do want to hear from the public, okay,  
21 before we go on to our next discussion area, and we'll probably  
22 do that after the break, but maybe we'll do it before.

23 But what I would like people to think about is what  
24 -- Tony raised a number of points, and one of them is a -- it  
25 appears to me -- fairly neutral process point, and it goes to

1 some of the issues that we were -- a lot of other people  
2 raised, is a thorough evaluation of real cases in terms of what  
3 worked, what didn't work before proceeding with any rule-making  
4 on this effort.

5 Now, Tony cited performance objective number five,  
6 the substantive soundness, sort of the litmus test of whether  
7 something -- whether a particular case worked or didn't work.  
8 I'm not sure -- I don't know if people agree with that or not.

9 Then, I think, Tony, you talked about citizen  
10 participation is a key to perhaps testing substantive  
11 soundness, but now it sort of happens in a haphazard way  
12 because of resource limitations, and I know there's people  
13 around the table who have been talking about this for years in  
14 terms of there must be a more systematic way to test this out.

15 Is that a fair summary?

16 ROISMAN: Yes.

17 CAMERON: All right.

18 I think we need to revisit some of these issues in  
19 our discussion, and I do want to get you to a break. So, let's  
20 go to Ellen, Jim, finish up with Bob, and then we'll see if we  
21 can -- I think Judy and perhaps some others might want to say  
22 something.

23 Ellen.

24 GINSBERG: There's been a lot of discussion this  
25 morning about the motivation of the industry, of the NRC,

1       etcetera. Tony touched on it. Others at the table have  
2       touched on it. And I really think that that misses the mark in  
3       terms of focus.

4               I think you're not going to get to a better process,  
5       whatever the form of that process is, until you focus on or  
6       look at the objective of the process.

7               Let me just give you an example of what I'm talking  
8       about.

9               We sat down with some other folks in the industry in  
10       anticipation of this meeting and tried to craft what we  
11       believed might be a reasonable, if you will, mission statement  
12       or objective of the hearing process, and I will provide it to  
13       you for your consideration.

14              What we came up with was that the objective of the  
15       NRC's hearing process should be to provide a fair opportunity  
16       for interested members of the public to raise well-defined  
17       issues that are within the scope of review and for the NRC to  
18       efficiently reach a legally and technically supportable,  
19       substantive conclusion.

20              It goes directly to Tony's point about, really, what  
21       we're after here is the right, if you will, or a solid decision  
22       at the end of the process. I think that's extremely important  
23       and something that we shouldn't lose sight of.

24              You've got a whole host of performance objectives,  
25       but if you don't know what the objective of the process is,

1       it's very hard to create criteria for whether that process did  
2       or did not meet its objective.

3               The other thing is that I think it's important -- and  
4       Susan mentioned that they view as a victory delaying the  
5       process.

6               I think it's important to recognize that there are  
7       different agendas. Tony put his finger on it when he said, you  
8       know, there are polar extremes, if you will, in view about what  
9       the definition of victory is, if you will, and I think that's  
10      important to recognize, because I think to craft a process, at  
11      least knowing that our view would be that that is not an  
12      objective that's sustainable, is important.

13              Your view obviously differs, but I think it's  
14      important to get that on the table.

15              In addition, Steve talked about the adversary  
16      features of the, if you will, formal hearing process, and I  
17      think it's important to dispense with these categories of  
18      hearing processes, formal or informal, because this doesn't fit  
19      readily into formal adjudication in the sense of a courtroom  
20      proceeding.

21              You don't use Federal Rules of Evidence, or at least  
22      you don't adhere to them rigidly, and so, I think if we talk  
23      about it as a hearing process, it is more productive, and Mal  
24      had stated that earlier.

25              I think you can retain some of the features that we

1 currently have.

2 I think you can dispense with some of the features  
3 that we currently have and still allow the public to  
4 participate, to get its issues on the table, put them before a  
5 Federal agency that's going to evaluate them, and have them  
6 resolved.

7 Our view is that some of that can be done on the  
8 papers far more than it is done now, but it is not a monolithic  
9 issue, it is a process that bears evaluation and that you can  
10 look at a whole host of combinations and come up with a better  
11 process.

12 CAMERON: Okay. Thanks, Ellen.

13 What I'd like you to do during the break is if you  
14 could give me your statement of the objectives of the hearing  
15 process, which I think wrapped -- pretty much wrapped all of  
16 those five objectives that were discreetly identified by the  
17 staff.

18 I think it wrapped up most of that. So, I'll write  
19 that on a flip-chart for us, and perhaps we'll get back to  
20 discussing that.

21 Jim, you've been waiting patiently for a while.

22 RICCIO: I'd just like to toss this out to everyone  
23 around the table.

24 Why would you give up your rights to  
25 cross-examination and discovery? Would you do that on behalf

1 of your industry? I doubt it.

2 But you're asking the public to basically take a back  
3 seat and basically to remove this title formal/informal -- I  
4 think there are substantive things that are going on there.

5 When you remove our rights from being formal to  
6 informal, you take away discovery and cross-examination, and I  
7 see no reason to give those up.

8 I enjoyed Tony's dissertation, and it raised issues  
9 of public confidence. That's supposedly one of the agency's  
10 cornerstones. I don't see that circumscribing the public's  
11 rights is going to enhance public confidence in the agency,  
12 industry, or the process.

13 Maybe you can address those after the break. Would  
14 you give up your rights to cross-examination?

15 CAMERON: I think -- I don't know when we'll exactly  
16 get to that issue, but I think that the context that people  
17 might put that question in is not would you give up your rights  
18 to discovery or cross examination, but are there any areas in  
19 this whole hearing domain where cross-examination or discovery  
20 is perhaps not needed? There needs to be a context put around  
21 it, but I think we need to have that discussion. I mean if it  
22 does come down to that sort of bald statement, then I think  
23 that's revealing of a lot of things.

24 Bob, do you want to wrap up the table discussion for  
25 us, please?

1 BACKUS: Sure.

2 [Laughter.]

3 BACKUS: First of all, Tony, you are showing your  
4 age. It wasn't Nashua, it was Manchester. And it wasn't the  
5 Appeal Board, it was the Commission, and I know that because  
6 I'm researching my book, which is totally historically  
7 accurate, I assure you.

8 Just a couple of things.

9 First of all, I think there is a possibility of a  
10 grand bargain between the sides here, and it would involve some  
11 of the things Tony said, some of the things Steve said, some of  
12 the things Jim said.

13 I think we'd be well willing, speaking for public  
14 interest advocates, to see the process expedited to a quicker  
15 decision, so we don't have seven years, and the quid pro quo  
16 would have to be do we have a reasonable chance to prevail, a  
17 reasonable chance to prevail?

18 That would require that intervenors be given  
19 financial support to make a case in a timely manner. It would  
20 require that we stop playing these games with the contentions  
21 issue, which the contentions have become almost the trial now.  
22 To get an admissible contention, you almost have to prove your  
23 case just to get in the door.

24 If we could make that agreement, that the Commission  
25 will -- and we'd have to see evidence of this -- I don't know

1     how it would be -- be capable of making a decision to turn down  
2     a license in a major case -- and I acknowledge Diane Curran for  
3     her skill in doing it in the one case I can think of -- then I  
4     think you'd find us much more willing to participate in  
5     expediting the process.

6             If this was an EPA gathering, I suspect the industry  
7     would be arguing against any informality in the procedures,  
8     because that agency does not have the cache of being as allied  
9     with the industry as the NRC does. I think we'd be taking  
10    different positions on this.

11            In looking through the materials that were provided,  
12    I went through the other agencies, and I noticed that the EPA  
13    is very much continuing with pretty formal procedures in its  
14    decision-making, and apparently there's not much effort there  
15    to change that. It's here that that's happening.

16            So, we get very suspicious about that.

17            Another thing that I think needs to be dealt with and  
18    the reason for a lot of citizen unhappiness is we don't ever  
19    get to raise the issues that really concern citizens in a major  
20    manner.

21            Like, for many citizens, a major issue is nuclear  
22    waste. We never get to raise that in licensing issues. That's  
23    all handled generically in some way. One time Tony succeeded  
24    in having that generic method invalidated by the D.C. Court of  
25    Appeals, until the Supreme Court got ahold of it, in the NRDC



1 and Vermont Yankee case, but that's something that's got to be  
2 looked at.

3 And the last thing I'll say -- and we can all go out  
4 and get our coffee -- is that Jim is absolutely right. This is  
5 of vital importance, because this is a democracy. And if this  
6 doesn't happen, not only will we see people marching, we  
7 already have.

8 The Seabrook case is a perfect example. I  
9 represented an organization called the Sea Coast Anti-Pollution  
10 League. The president of that organization was a fellow named  
11 Guy Chichester.

12 He was just profiled in the Concord Monitor as one of  
13 the 100 people who changed New Hampshire, which I kind of  
14 objected to, but that happened.

15 Mr. Chichester would go to the licensing hearings and  
16 see me march in -- and I was almost never there when Tony was,  
17 because we couldn't afford to be there on the same day. It was  
18 very rare that two intervenor lawyers would be there.

19 He'd come in and he'd see me and he'd see three  
20 Robeson Gray lawyers representing the applicant, three staff  
21 lawyers, and they were all in favor of the license, and then  
22 he'd see me, and he told me this to my face, says my little  
23 lawyer -- I was thinner back then -- my little lawyer's getting  
24 creamed in there, and he went out and formed the Clamshell  
25 Alliance.

1           So, you know, it is a democracy, and it's not going  
2 to be -- people are not going to give up their democratic  
3 rights, and they should be preserved in the hearing process,  
4 and it's got to be a meaningful process where the outcome is  
5 not always seen as fore-ordained, which is the problem we have  
6 now.

7           CAMERON: Okay. Thank you, Bob, and maybe one of the  
8 values of this discussion, I think, has been to perhaps  
9 illuminate a couple of paths forward for discussion during the  
10 rest of the day.

11           Tony was -- had suggested perhaps a process solution  
12 that should be -- we should explore.

13           Bob's grand bargain streamline -- I read that as,  
14 well, there are certain fixes that all of you who have  
15 participated in these processes might agree to, regardless of  
16 what the motivation, agenda, etcetera, etcetera, is.

17           So, perhaps it's possible to identify those, but the  
18 second part of the equation was also one that Tony brought up,  
19 which is the reasonable chance to prevail, what needs to be  
20 done on that account, and I mean you people here have the  
21 power, this group, to at least shape your own agenda and  
22 discussion for the rest of the day.

23           We have to see how that then goes in as grist for the  
24 mill for the Office of General Counsel and the Commission, but  
25 certainly, if you think, as a group, there's some productivity

1 to exploring certain issues, we can do that.

2 So, it's something to think about during the break.

3 Let's see if we can just get some people who might  
4 want to talk now quickly before we break.

5 Judy, do you want to say something?

6 JONSRUD: Yes. Thank you, Chip.

7 I have worked with a number of the people at the  
8 table.

9 I concur with the comments from Diane and from Steve,  
10 very strong comments, so Jim, Bob, and Tony, and there are a  
11 lot of things I'd like to say, but I am a firm adherent to the  
12 importance of the Federal Administrative Procedure Act.

13 Going back a number of years, the NRC began -- well,  
14 in its recent history, began to relax control in a very serious  
15 manner by its change in its regulatory philosophy, and I think  
16 that that is to the detriment of public safety.

17 Now, to attempt to bypass or eliminate the provisions  
18 that give access to the judicial system of the United States is  
19 outrageous beyond words.

20 The Commission, in my opinion, should abandon any  
21 efforts to relax those provisions of the Administrative  
22 Procedure Act. They're vital.

23 Tony mentioned TMI, and if I may, I was the pro se  
24 litigant in the TMI-2 operating license. We did it with no  
25 funding whatsoever. We did it with no technical or legal

1 assistance.

2 We call it, you will forgive me, kangaroo attorneys  
3 in the kangaroo court, and I'm afraid that that sums up  
4 precisely the nature of the proceedings that we, from the  
5 citizen's perspective, have had to endure all these years.

6 In the TMI proceedings, we were denied opportunity to  
7 question accidents whose consequences might be more severe than  
8 the safety systems were designed to withstand. On what basis?  
9 That the Commission's staff nuclear engineers were assured that  
10 these were highly improbable events and, therefore, they  
11 needn't even be considered.

12 We were not permitted to question the regulations of  
13 the Commission, although my colleague, Dr. Kepford, was able to  
14 do so in a manner that subsequently was concurred with by a  
15 member of the Appeal Board and was taken further in the courts.

16 It didn't stop the issuance of the license nor the  
17 accident that resulted.

18 I think that we have, in the TMI-2 experience, the  
19 real proof of this very unsavory pudding that has been the  
20 NRC's hearing procedure, and I would call your attention, going  
21 clear back, of course, to the declaration at the beginning of  
22 the Atomic Energy Act, which, very frankly, gives the license  
23 to the Commission to promote, to continue to promote and  
24 develop to the maximum extent the commercial as well as  
25 military nuclear industry, but in this case the commercial.

1                   One other very quick point.

2                   It has distressed me for a very long period of time  
3           that the decisions concerning human health and safety, not to  
4           mention all other components of the bio-system, are made  
5           primarily in this agency by nuclear engineers.

6                   These are people who are not trained, who are not  
7           competent in the fields of biology, ecology, medicine,  
8           genetics, the issues that count with respect to health and  
9           safety of the public and the environment.

10                  I strongly concur with the recommendations that  
11           you're hearing from the attorneys who have worked their hearts  
12           out for the protection of the public's interest.

13                  I have very little hope that the Commission will  
14           adopt those recommendations, but if you do so -- that is, if  
15           you fail to adopt these positive recommendations -- you do  
16           serious further damage to the American political and judicial  
17           system.

18                  CAMERON:   Okay.   Thank you, Judy.

19                  You made a number of points, but the one thing that  
20           sort of comes out to me as a facilitator is that, you know,  
21           harkening back to some of the comments from Mike now, Bob,  
22           Tony, others around the table, would be it would be interesting  
23           to see if, at least for this group's discussion, if perhaps  
24           there is a way to discuss what could be fixed, and of course,  
25           there's a lot submerged there, but what could be fixed with the

1 existing hearing process and perhaps get away from the industry  
2 versus the citizen perspective, in a way.

3 I don't know if we can get to a discussion like that,  
4 but it might be informative and interesting.

5 Does anybody have any other comments out here before  
6 we take a break?

7 Yes, sir, and if you could just give your name and  
8 affiliation, if appropriate, for the transcript?

9 ZANNONI: My name is Dennis Zannoni. I'm here from  
10 the State of New Jersey, work in the Department of  
11 Environmental Protection. Actually, I'm here on other  
12 business, but my management asked me to attend, because they're  
13 very interested in this discussion.

14 Whatever the outcome of this discussion would be,  
15 what's taken place already, will be helpful in the way we  
16 manage processes within the State, and so it's good to see the  
17 consistency that's developing or the direction that's  
18 developing in the Federal Government approach to these types of  
19 issues and also on the state level, because it's difficult, at  
20 times, to have processes in a state setting that people have a  
21 certain viewpoint of, and in fact, nuclear power plants that --  
22 we have four in New Jersey, and they're going through separate  
23 processes, so it just helps in the alignment. So, I'm glad  
24 that I attended here this morning.

25 I only have two brief comments, because I know folks

1 want a break, and that is, when we reviewed the SECY paper, I  
2 think it was imperative -- and already mentioned a few times  
3 and I just want to reiterate it -- the need for a study to  
4 determine what some of the root causes were, and I don't think  
5 you can fix anything till you really understand what the  
6 current existing problems are, and the second point is it does  
7 come to a discussion about process.

8           What we found very helpful was when some of these  
9 hearings, whether formal or informal, can actually take place  
10 in the vicinity of the location of the problem. We felt that  
11 that definitely, more than anything, outweighs -- well, builds  
12 the public confidence that we've seen lacking in this area for  
13 some time, and the other thing is it would be helpful to have a  
14 discussion about risk-informing the public hearing process.

15           The NRC as an agency, I think, has taken a bold step  
16 in doing that.

17           You have a pilot program to help risk-inform the way  
18 they inspect and overview nuclear power plants, and you can be  
19 one side or the other, but if you accept that as a mechanism to  
20 try to glean out some of the issues that are raised, there may  
21 be disagreement, but we're finding out in our state that it's  
22 becoming more and more helpful to try to eliminate unnecessary  
23 issues that are brought to the table.

24           So, that's what I'd like to add, and thanks for  
25 meeting today.

1 I'd like to thank the NRC for having this type of  
2 discussion, because we find it very helpful.

3 CAMERON: Thanks a lot, Bob, and thank you for being  
4 here.

5 It's great that the State showed that interest in  
6 having you here, and in terms of risk-informing, the closest  
7 that I think that we have gotten to that is perhaps Tony  
8 Roisman's point about substantive soundness being the litmus  
9 test that we might be looking for here.

10 Maybe that is risk-informing the process, and Murphy,  
11 do you want to get on the record here?

12 MURPHY: We had a roundtable discussion in Las Vegas  
13 just a week-and-a-half ago in front of the Advisory Committee  
14 on Nuclear Waste on that very subject, risk-informing the  
15 hearing process specifically in the repository context, but I  
16 think the Commission has already -- or at least an advisory  
17 committee to the Commission is already taking a deep look at  
18 that.

19 CAMERON: Thank you, Mal.

20 Let's take a break till about quarter after. That  
21 gives you about 25 minutes, and Jeff Lubbers has been kind  
22 enough to offer to do sort of a summary of emerging trends, and  
23 I think that that will not get us off-track in terms of miring  
24 us down into informal or formal but perhaps give us a  
25 springboard from which to proceed on that.



1                   So, we'll figure out what we're doing when we come  
2 back.

3                   [Recess.]

4                   CAMERON: I think that was a real good starting off  
5 session on this subject. So, I'm going to ask you to all go  
6 home.

7                   Seriously, we want to -- we are going to have Jeff  
8 Lubbers, who's a professor of law at Washington College of Law  
9 at American University, talk to us about some emerging trends,  
10 and we'll talk to Jeff about his presentation, but based on the  
11 discussion this morning, what I would suggest is that I think  
12 we need to deal with this objective issue, and I have written  
13 down the objective that Ellen Ginsberg read earlier, and we may  
14 not agree with all of it, we may want to fine-tune this, but I  
15 think at least we need to do something on the objective of the  
16 hearing process, okay? And I'm going to come back to this in a  
17 minute, and I see that some of you cannot see it and probably  
18 can't read my writing.

19                  BACKUS: Well, Tony has senior moments on memory. I  
20 have senior moments on vision. I can't see that far.

21                  CAMERON: After the objective and before we start to  
22 get into the two parts of the so-called grand bargain equation,  
23 what fixes would we -- might we agree on or might we want to  
24 discuss, and that second part of the equation, which is the  
25 resources -- the resources is an underlying theme, but a

1 systematic, well-prepared examination from the public's point  
2 of view of these issues -- we'll get to that, but there were a  
3 lot of concerns expressed around the table -- delay, etcetera,  
4 etcetera -- about the hearing process or changes to the hearing  
5 process, and I thought it might be useful to identify those  
6 concerns, and I'm using concerns rather than positions, okay?

7 In talking with Judge Heifetz during the break, from  
8 his experience, he was pointing out that, if you have a handle  
9 on what the concerns are, then perhaps we can start to work to  
10 address those concerns, and I think that's all part of  
11 examining the grand bargain, but at any rate, that's going to  
12 be after Jeff Lubbers.

13 Does anybody have any comment son that sort of broad  
14 way of proceeding at this point?

15 [No response.]

16 CAMERON: Okay.

17 Well, let's go to Jeff for a presentation.

18 Thank you, Jeff, too, for being here.

19 LUBBERS: Thanks, Chip.

20 I thought I'd speak from here, since it might lend me  
21 a little more authority, and I think I need it in this group.

22 I want to thank Chip for inviting me to this  
23 roundtable.

24 In my role at the Administrative Conference, I heard  
25 a lot about the NRC from NRC alumni such as Bill Olmsted and

1 Max Pagland, who unfortunately are no longer with us, and from  
2 Gary Ettles, who's teaching in England now, and I'm sure they  
3 could have contributed a lot to this discussion, as well.

4 I sort of have a little trepidation about speaking to  
5 this group, because I feel like, given the expertise in this  
6 room, I'm about to describe the basic recipe for French toast  
7 to the Academy of Cuisine of Paris, France, but I also want to  
8 start off with a few reactions to what I've heard in the  
9 opening discussion, which I thought was very interesting, very  
10 illuminating, and there were certainly some points that I think  
11 we did reach some potential common ground.

12 I think, with respect to the objective there, I think  
13 that we mentioned fairness, efficiency, effectiveness, and I  
14 think acceptability has to be added in there at some point,  
15 because that's -- perceptions of those things matter a lot in  
16 this field.

17 I also wanted to react a little bit to the comment  
18 that delay, in and of itself, might be an acceptable strategy  
19 or good in this area, and I'm reminded a little bit about how  
20 this delay issue plays out in other arenas.

21 You know, the so-called regulatory reform bills that  
22 have been pending in Congress for the past several congresses  
23 have been opposed by some of the very same public interest  
24 groups that are represented in this room today, like Public  
25 Citizen, because they would increase the delays and the

1       ossification of rule-making, and you know, I've heard the  
2       regulatory reform bills the Regulatory Sand in the Gears Act of  
3       1999, and so, that's something that I, as an administrative  
4       procedure person, don't really like as a goal in and of itself.

5               I also agree with the comment that the Administrative  
6       Procedure Act is a sound law, and after all, it stood the test  
7       of time pretty well for the last 50 years, and I think it  
8       should be generally followed by Federal agencies in their  
9       adjudicative and rule-making processes, but we also have to  
10      remember that the APA does have a lot of built-in flexibility  
11      within it.

12             I agree with Tony Roisman's comments, and it was a  
13      real pleasure hearing him give his talk, because I remember  
14      back in those days when he was a very effective advocate, and I  
15      can see why now, again, but I agree with his comment that we  
16      may need a study of some of these issues, and unfortunately,  
17      the Administrative Conference isn't around to do the study, but  
18      I think that we need to know more about where the time lapses  
19      take place in these proceedings.

20             Are they in the pre-hearing stage, are they in the  
21      hearing stage, are they in the post-hearing stage? And why do  
22      they take place when they do?

23             I also agree with the general comment that it's  
24      probably a good idea to review where we are in the agency's  
25      Code of Federal Regulations.

1           I'm surprised that reinventing Government initiative  
2 hasn't forced you to cut the pages of your CFR already, but I  
3 think that it is sort of a question for someone like me, who's  
4 not steeped in the substance of the nuclear power field, to  
5 wonder why does the Commission need so many different types of  
6 modified procedure?

7           I think we all agree that enforcement cases should be  
8 done through formal, APA-style adjudication, sub-part G. I  
9 don't think there's any disagreement with that. At least I  
10 haven't heard any. And I think that most people here would  
11 agree that some type of decisions made by the NRC do not need  
12 full-fledged formal APA adjudication.

13           Some sort of modified procedure, if we can use that  
14 term, is a good idea in some types of decisions that the NRC  
15 makes.

16           So, if we can sort of take that as a broad area of  
17 something to talk about in the rest of the meeting, I think  
18 that might be helpful.

19           I also certainly agree with the idea that intervenor  
20 funding is something that should be pursued. I mean I thought  
21 that was a tragedy back in the '70s when those programs, not  
22 just at the NRC but some of the other agencies, were eliminated  
23 by Congress.

24           In the break, I was talking with Roland Frye about  
25 the fact that the food and drug industry has happily paid for

1 the FDA's -- or added supplements to the FDA's budget so that  
2 the FDA could staff up to handle new drug applications, and I  
3 know the industry essentially funds the NRC, and I'm not sure  
4 how it works with respect to the appropriations process in  
5 Congress and then some figure is arrived at and then the  
6 industry essentially pays user fees to the NRC, but I would  
7 hope that there would be some way that some little increment  
8 could be added, like we see in our phone bills, to this NRC  
9 budget so that a fund could be established for intervenor  
10 funding.

11 So, those are just some ideas that the discussion  
12 generated in my own mind, as we discussed this morning, but my  
13 basic task that Chip asked me to do today was to provide sort  
14 of an overview for the rest of the meeting, what are the legal  
15 parameters for today's discussion, what does the APA require in  
16 terms of adjudication, and what are the emerging trends?

17 I think the written materials do a good job of  
18 providing some good information, an overview of many of these  
19 issues. So, if you've read those, this just might be a  
20 refresher for some of you.

21 But under the APA, agency adjudication is either  
22 formal or informal. That's the way the APA is set up.

23 When we talk about formal adjudication, sometimes  
24 called APA adjudication, we're talking about adjudication that  
25 is required and controlled by the procedures in sections 554,

1 556, and 557 of the Administrative Procedure Act.

2 Anything else has come to be known as informal  
3 adjudication, and there is no section in the APA called  
4 informal adjudication.

5 The only section that bears on that is section 555,  
6 which is called ancillary proceedings, and there's not much in  
7 that.

8 Of course, the due process clause applies to informal  
9 adjudication.

10 Now, just a little bit of background.

11 When you teach administrative law, you often start  
12 with the due process cases, because that sort of forms the  
13 backdrop for administrative adjudication and the distinction  
14 between adjudication and rule-making which is at the heart of  
15 the APA.

16 If the issues in a dispute involving the government  
17 involve questions of general applicability, like whether your  
18 jurisdiction's property tax rate should be raised 5 percent  
19 across the board, you as a homeowner do not have a right to a  
20 trial-type adjudication on that issue. There are no facts that  
21 are specific to you with respect to that, and this is the  
22 famous *Buy Metallic* case from the early -- first part of this  
23 century, and these types of decisions are usually those that  
24 are made by legislation. A citizen doesn't have a right to a  
25 hearing before Congress passes a law.

1           Of course, Congress can have hearings, but no  
2 constitutional right to a hearing, and the analog to that in  
3 the administrative context is rule-making. There's no right to  
4 an oral hearing in the APA for rule-making. There's no  
5 constitutional right to a oral hearing with cross-examination,  
6 etcetera, in a rule-making situation.

7           But if you have a dispute that involves property or  
8 liberty that's individual to you -- like if you disagree with  
9 the assessment of your own individual property, yours was  
10 raised -- your assessment was raised 10 percent, your  
11 neighbor's was not, you have a right to a hearing on that  
12 point.

13           This is the Londoner vs. Denver case, the other early  
14 due process case.

15           Now, these are all cases involving, you know, real  
16 property, and if your interest was affected on an  
17 individualized basis, you had a right to a hearing. Back then,  
18 a hearing meant a trial, essentially, trial-type hearing,  
19 similar to courtroom trials.

20           Now, the high water mark with respect to due process  
21 procedure in administrative hearings was the Goldberg vs. Kelly  
22 case.

23           Now, I put in your materials the 10 procedural  
24 ingredients of Goldberg vs. Kelly, and there's no secret here.  
25 I mean notice, confrontation of adverse witnesses, oral



1 presentation of arguments.

2           If you all don't have my sheet, I'll go through them  
3 -- opportunity for cross-examination of adverse witnesses,  
4 right to retain counsel, disclosure of opposing evidence,  
5 decision on the record of the hearing, statement of reasons and  
6 evidence relied on, and impartial decision-maker.

7           It's pretty much what you have in a courtroom trial,  
8 although you don't have a judge -- a judge wasn't actually  
9 required by Goldberg vs. Kelly, merely an impartial  
10 decision-maker, but it's pretty close to a trial, and it seemed  
11 like the appropriate level of procedure to have when you're  
12 deciding questions of individualized adjudicative fact,  
13 especially in an area of welfare terminations, which was the  
14 Goldberg vs. Kelly case.

15           But the concept of property and the concept of  
16 liberty began to expand in the Supreme Court jurisprudence to  
17 include entitlements as property and to include situations  
18 where people were stigmatized as liberty interests, and at that  
19 point, with the expansion of the types of interests that gave  
20 rise to hearings, it became clear, at least to the Supreme  
21 Court, that you couldn't have a trial ever time an entitlement  
22 was threatened by the government.

23           You had a right to a hearing, but it didn't mean a  
24 trial-type hearing, and actually, what happened in the Goldberg  
25 vs. Kelly aftermath is kind of interesting.

1           There's been some writing about what happened in New  
2       York, where the state was faced with having to do a lot of  
3       formalized hearings in the welfare termination context, and  
4       what they did was they avoided hearings.

5           They tightened eligibility rules so that fewer people  
6       go on the welfare rolls, they promulgated very bright-line  
7       rules, eliminated special treatment waivers, and they cashed  
8       out non-monetary benefits, and the upshot of all this was that  
9       it led to fewer beneficiaries getting on the rolls, the  
10      elimination of adjudicators and social workers, and a  
11      substitution of clerks to apply these bright-line rules.

12           Was this a net gain for the beneficiary community?  
13      Arguably not.

14           And I think that agencies' ability to sort of  
15      structure their proceedings to avoid formal trial-type  
16      adjudications because of the cost involved led the Supreme  
17      Court to come up with the three-pronged balancing test in the  
18      Matthews vs. Eldridge case, and that was similar to Goldberg  
19      vs. Kelly.

20           It was a Social Security termination situation, and  
21      the Court said, well, we're not going to require the 10  
22      ingredients of Goldberg vs. Kelly, we're going to have a  
23      three-part balancing test.

24           The nature of the private interest affected, first  
25      prong of the test, the risk of error due to the process used

1 and the likelihood that additional procedures would reduce that  
2 risk of error, and three, government's interest in avoiding  
3 additional procedures.

4 It's kind of a cost-benefit analysis, and it's much  
5 more open-ended, obviously. The courts have to go through this  
6 balancing test in every situation, and just a simple example,  
7 the Goss case, Goss vs. Lopez, where the high school student  
8 was suspended for 10 days.

9 He went to a public high school. He had a right to a  
10 hearing, it was an entitlement, but he didn't get a trial. He  
11 wasn't able to have a trial in the auditorium of the school  
12 with counsel and cross-examination.

13 The hearing he got was a chance to make his case to  
14 the principal, to say I was being bullied by somebody and  
15 that's why I got into a fight, and so forth. That was the  
16 hearing that the Supreme Court granted him.

17 So, in every context of entitlements, whether it's  
18 prison cases, public housing, student discipline, employee --  
19 public employee dismissal cases, there's sort of jurisprudence  
20 that's grown up using the Matthews vs. Eldridge calculus.

21 Fortunately, the APA is not so difficult.

22 If you have a requirement of a formal adjudication  
23 required by another statute, then the APA's process is  
24 required, and that comports with due process, but as  
25 illustrated by the AEC act, the triggering language can raise

1 questions.

2 Section 554 of the APA specifies that it applies in  
3 every case of adjudication required by statute to be determined  
4 on the record after opportunity for an agency hearing.

5 Now, as the memo that you gave out accurately  
6 indicates, the Supreme Court has never definitively interpreted  
7 that phrase in section 554, but it did interpret a nearly  
8 identical phrase in the rule-making section, 553(c), to say, in  
9 the Florida East Coast case, that formal rule-making is not  
10 required unless the underlying statute uses the magic words "on  
11 the record."

12 The word "hearing" itself, by itself, was not enough  
13 to trigger the formal rule-making process, and the lower courts  
14 have generally applied this case as reasoning to the phrase in  
15 section 554, as well, most notably in the West Chicago case in  
16 the 7th Circuit and in the Chemical Waste Management case in  
17 the D.C. Circuit, though the courts have allowed for the  
18 possibility of, quote, "exceptional circumstances demonstrating  
19 that Congress intended to require the use of formal  
20 adjudicatory procedures."

21 Whether these circumstances are present in relate to  
22 the NRC licensing of nuclear power plants under the AEA is a  
23 very interesting question. It's not what we're here to debate  
24 today, but that's where the line between formal and informal  
25 adjudication is, and it becomes important, because if it's not

1 a section 554, 556, 557 type of hearing, what is it?

2 The answer is it's informal adjudication. At least  
3 we call it that. I mean I know it sounds pejorative to some of  
4 you, but it's just -- that's what we call it in the  
5 administrative law world. It's not formal adjudication, it's  
6 informal.

7 What procedures do agencies have to follow in  
8 informal adjudication under the APA? Only those in section 55,  
9 which aren't very much -- the right to counsel or other  
10 representative, the right to retain copy of report submitted,  
11 right to a subpoena when the law permits one, and a right to a  
12 statement of reasons, prompt notice of denial of application  
13 and petition with reasons.

14 Now, of course, due process may require more, and if  
15 you've seen my Goldberg vs. Kelly chart again, there are some  
16 numbers off to the side, and those are from an article that  
17 Paul Verkail did in 1976.

18 He's now the Dean at Cardoza Law School, and he did  
19 something that I thought was very helpful in thinking about  
20 informal adjudication, because most adjudication in the Federal  
21 Government is informal.

22 If you apply for a National Park permit, that's  
23 adjudication. If you send an FOIA request and ask for a ruling  
24 on the FOIA request, that's an adjudication.

25 So, obviously, most adjudications in the Federal

1 Government are informal, and what Verkail did was he looked at  
2 four departments -- HUD, Agriculture, Commerce, and Interior --  
3 and he identified all the non-formal, non-APA administrative  
4 law judge type of adjudications in those four departments, and  
5 he found 42 of them, and then he looked at the Goldberg vs.  
6 Kelly ingredients and he found -- he compared -- he looked to  
7 see whether the departments offered those procedures in the 42  
8 programs, and he found that almost all of the programs required  
9 notice, statement of reasons, and an impartial decision-maker.  
10 About half had an oral presentation of arguments. Only nine  
11 had cross-examination.

12 Now, of course, these procedures or these functions,  
13 these adjudicative programs, were all over the lot -- grant  
14 programs, food stamps programs, procurement, government  
15 contract type things. So, it really ranged all over the place.

16 But I think it does sort of help think about the sort  
17 of overall scope of agency adjudication to realize you have  
18 many, many types of informal adjudications in the government.

19 Some other right to hearing issues have come up.

20 What if the agency's own regulations require a  
21 trial-type hearing? Well, of course, agencies have to follow  
22 their own regulations.

23 What if the regulations only use the term "hearing"  
24 and then also mentioned a record and the statute did require a  
25 hearing on the record? That would not be enough to trigger

1 section 554, because agency rules themselves do not trigger  
2 554; only the statutes can do that.

3 We don't want to discourage agencies from granting  
4 additional procedural protections for fear that they might  
5 somehow trigger a statutory requirement under section 554.

6 Another hearing question that comes up is what  
7 happens when a statute grants a right to a hearing on the  
8 record but the agency issues generic rules that essentially  
9 eliminate or severely narrow the issues that can be disputed in  
10 each individual case?

11 The generic rule-making issue was mentioned earlier.

12 The administrative law case law permits this.  
13 There's a 1966 case called the block space case, American  
14 Airlines vs. CAB, where the CAB had issued a rule, gone through  
15 the rule-making procedures of the APA, that permitted only  
16 all-cargo airlines to offer so-called block space, which are  
17 large reserved blocks of space on aircraft that go for a  
18 cheaper rate, and the rule said that combination cargo and  
19 passenger airlines could not offer this type of fare, and so,  
20 they're prohibited from doing this.

21 Their licenses were amended to reflect this, after  
22 the rule-making process, and assume there were some good  
23 reasons to do so.

24 American Airlines was one of these combination  
25 carriers and said wait a minute, we have a right to a hearing

1 on the record under our statute before the license could be  
2 amended, and the CAB denied the request for a hearing, saying  
3 that the rule covered the situation; you had a chance to  
4 participate in the rule-making process, raise these issues,  
5 there's nothing to have a hearing about, and Judge Leventhal,  
6 who was a leading administrative lawyer before he became a  
7 leading administrative judge on the D.C. Circuit, went through  
8 the difference between rule-making and adjudication and  
9 determined that agencies have a choice to make policy through  
10 rule-making or adjudication, and in this case, they went  
11 through a legitimate rule-making, and they didn't single out  
12 individual carriers, they treated these categories -- all the  
13 carriers within each category alike, all the combination  
14 carriers were treated the same way and so forth, and the Court  
15 said the proceeding before us is rule-making, both in form and  
16 effect, there is no individual action masquerading as a general  
17 rule, so they denied the right to a hearing.

18 The City of West Chicago case illustrates the fact,  
19 if there's no disputed issue of material fact, the agency can  
20 turn down the request for a hearing, even though the statute  
21 requires a hearing on the record in these cases.

22 There are many statutes that now condition a right to  
23 a hearing on the record on there being a disputed issue of  
24 material fact.

25 I was involved in a case involving the Bank Holding



1 Company Act, trying to block a merger of two large ATM  
2 companies in Ohio, and we were representing a small ATM company  
3 that was trying to block the merger, and under the Bank Holding  
4 Company Act, we had a right to a hearing on the record if there  
5 was a disputed issue of material fact.

6 So, we strove mightily to come up with some factual  
7 issues that we thought were disputed issues of material fact,  
8 the fact that the rates would go up if the merger was allowed  
9 to go forward, because of the way the switching fees work in  
10 the ATM industry, this is going to create anti-competitive  
11 practices and the rates were going to go up in certain  
12 jurisdictions, and the Fed said, well, these are all economic  
13 issues, they're not really factual disputes, they're more like  
14 policy issues, so we deny the hearing.

15 We went to the D.C. Circuit, persuaded the panel, two  
16 to one, that we did have disputed issues of material fact, and  
17 so, we won the first round.

18 The Fed asked for an en banc review. It was granted.  
19 So, we knew we were in trouble on this issue.

20 The Fed then went to Congress and got the statute  
21 changed so that there was no right to a hearing for anything  
22 except savings and loans mergers.

23 So, we went back to the D.C. Circuit and said, well,  
24 you should revoke your en banc review, because this is not a  
25 precedential case anymore. There's never going to be another

1 ATM merger that's going to be covered by this statute, and the  
2 Circuit agreed with us and revoked their en banc review.

3 They also vacated the panel decision, unfortunately,  
4 and our clients eventually settled with the merging companies.

5 So, everything ended okay for our clients, but it's  
6 just an illustration of how important it is to be able to show  
7 disputed issues of material fact and how this is such a crucial  
8 issue in many different types of licensing contexts, and there  
9 are a lot of cases that go both ways in the courts, saying  
10 that, yes, you should have had a hearing, no, you didn't  
11 deserve to have a hearing because you didn't have a disputed  
12 issue of material fact.

13 Now, another reason that the triggering language in  
14 the APA is important is that, if you're proceeding under  
15 Sections 554, 6, and 7, that also requires a separation of  
16 functions, and it also leads to a ban on ex parte  
17 communications, and it also requires the use of administrative  
18 law judges as presiding officers, unless you have a special  
19 statute, like the NRC does.

20 Now, with respect to separation of functions, I'm not  
21 going to really say anything. I know the NRC has struggled  
22 with this issue for many years. My contribution is just a  
23 little summary that I hand out to my students on separation of  
24 functions that tries to boil down the APA requirements.

25 Similarly, ex parte communications -- I think that

1 the NRC has an ex parte communications rule. I think that you  
2 would probably want to have one in any case, no matter what  
3 type of procedure you were doing, but if your statute does not  
4 require formal adjudication of the APA, there's no ex parte  
5 communications bar that applies to you under the law.

6 Now, I want to also point out that the APA does  
7 provide some greater flexibility in initial licensing. If you  
8 look at several of the sections -- for example, the separation  
9 of functions requirements don't apply to initial licensing  
10 cases.

11 Most agencies have voluntarily applied them to  
12 initial licensing, but the act does not require it, and some  
13 years ago, Professor Mike Asimov from UCLA wrote an article  
14 urging agencies to take advantage of the flexibility with  
15 respect to initial licensing cases in the separation of  
16 functions area, where you have technical issues that would  
17 allow more communication between staff and decision-makers,  
18 non-adversarial staff especially.

19 Also, section 556(d) specifies that, in initial  
20 licensing, an agency may, quote, " -- when a party will not be  
21 prejudiced thereby, adopt procedures for the submission of all  
22 or part of the evidence in written form."

23 So, the APA itself -- you talk about APA  
24 adjudication. It allowed, in initial licensing, the agency to  
25 adopt written procedures if the parties won't be prejudiced.

1           So, that's something that needs to be researched  
2 more. I don't know that much about the cases in this area, but  
3 there is some -- there's leeway for agencies to experiment  
4 there.

5           Another key element is the presiding officer. Under  
6 section 556 of the APA, either the agency head, one or more  
7 members of the Commission, in your case, or an administrative  
8 law judge must preside. It's very rare for agency heads to do  
9 so.

10          I was interested in your sub-part M, I guess it was,  
11 that sort of encourages agency heads to preside, but you know,  
12 I realize you have special statutory authority, that famous  
13 "notwithstanding" clause, that allows your panel members to  
14 preside rather than needing an administrative law judge, but in  
15 general, I just want to say a few words about what agencies are  
16 doing in this area, and we have Judge Heifetz, who certainly  
17 knows more about this than I do, but one of the trends, I  
18 think, in the administrative law area is that agencies have  
19 tried -- there's sort of a trend in that agencies are seeking  
20 to avoid the use of administrative law judges.

21          They're trying to find ways to use other  
22 adjudicators, even in relatively formal proceedings.

23          Administrative law judges are independent officers of  
24 the Federal Government. Their pay is set by statute. They  
25 have special tenure protections. They have special separation

1 of functions protections. They're not subject to performance  
2 evaluation, and they can't be assigned duties that are  
3 inconsistent with their role as ALJs.

4 They're still not completely independent, though,  
5 because they're agency employees, they have to follow agency  
6 policy, they're subject to certain managerial perks like office  
7 space, parking places, and that kind of thing, they can be  
8 subject to reductions in force, and you know, there are some  
9 subtle agency pressures that might be brought to bear on  
10 administrative law judges.

11 I put a chart of the number of administrative law  
12 judges in the various agencies at the end of your packet there,  
13 and it's a year-and-a-half old now, but it shows -- I think it  
14 illustrates that most of the administrative law judges are in  
15 three agencies, the Social Security Administration, Labor  
16 Department, and the National Labor Relations Board, and what's  
17 striking, I think, is how few administrative law judges are  
18 employed by most administrative and regulatory agencies.

19 For example, the departments of agriculture,  
20 commerce, education, HUD, and justice have only four, one, one,  
21 five, and six administrative law judges respectively, these  
22 huge departments.

23 The department of defense, state, and veterans  
24 affairs have none.

25 The five bank regulatory agencies share two, and

1 major adjudicatory and enforcement agencies like the  
2 Commodities Futures Trading Commission, FTC, International  
3 Trade Commission, Merit Systems Protection Board, and Small  
4 Business Administration only have one or two.

5 CPSC, Equal Employment Opportunity Commission, your  
6 own agency, the NRC, and the Postal Rate Commission have zero.

7 So, why is this? It's not because agencies have  
8 stopped adjudicating. It's because they have been able to  
9 eliminate their reliance on administrative law judges.

10 We did a study in Administrative Conference back in  
11 1989, and we identified almost 2,700 non-ALJ adjudicators in  
12 the Federal Government, and there are lots of big programs that  
13 use non-administrative law judge adjudicators, like  
14 Immigration, National Appeals Division of Agriculture, all the  
15 boards of contract appeals, the administrative patent judges,  
16 administrative trademark judges, Board of Veterans Appeals,  
17 MSPB, EEOC -- I could go on and on.

18 Now, Congress has been complicit in this, because  
19 they've allowed some agencies like EPA to use non-ALJ  
20 adjudicators to decide even civil money penalty cases where the  
21 penalty isn't too large.

22 Debarment and suspension of government contractors  
23 are handled by non-ALJ adjudicators.

24 So, I think the situation of the administrative  
25 adjudication is quite varied throughout the U.S. Government.

1       Why have agencies sort of voted with their feet on this? Well,  
2       I realize this isn't completely germane to the NRC, but I think  
3       there are three reasons, and one is that I think it's become  
4       difficult for agencies to select administrative law judges, or  
5       at least the type of judges they want, due to the operation of  
6       the selection process and the importance of the Veterans  
7       Preference Act in the rating of applicants for administrative  
8       law judge positions.

9               I don't want to go into too much detail and take too  
10       much time there, but I think the selection process has gotten  
11       so difficult that agencies would rather hire other lawyers,  
12       other types of employees to preside over even formal cases.

13              Managerial issues -- it's easier to manage most  
14       non-ALJ adjudicators because at least they can be evaluated,  
15       and I think agency managers feel that administrative law judges  
16       are -- you know, because they're exempt from any kind of  
17       appraisal, that they'd rather have somebody that they can do  
18       some sort of evaluation, and also, their salaries tend to be  
19       lower.

20              So, I think agency managers have great incentive to  
21       opt for using hearing officers who can be selected  
22       strategically, who are easier to manage, and who can be  
23       procured for sort of bargain rates, and so, you know, I'm not  
24       saying that this is a salutary development, that it's a good  
25       thing, but I think that the trend is clearly for agencies to

1 look for alternatives to the formal APA administrative law  
2 judge adjudication process.

3 In reality, I think it's unfortunate but  
4 understandable.

5 I think the APA does provide a good model for  
6 enforcement cases, and in initial licensing cases, there is  
7 some built-in flexibility, but if the agency is going to move  
8 to a more informal type of adjudication, the question still  
9 remains: What steps should the agency require?

10 Even in that list that Verkail provided, you know,  
11 some agencies provided all 10 steps of the Goldberg vs. Kelly  
12 formula for informal adjudication.

13 Which is the APA's provisions cause problems? Which  
14 is the sub-part G provisions cause problems? Is the problem  
15 really one of case management? Can most of the delay problems  
16 that have occurred be addressed through strict case management?

17 These are all issues that I hope this sort of  
18 overview will help inform the discussion, and if you have any  
19 questions that I can answer, I'll be happy to try to do so.

20 CAMERON: Okay. Thank you very much, Jeff, for that  
21 overview.

22 Do we have some questions or comments for Jeff,  
23 anybody around the table?

24 Jay?

25 SILBERG: One of the comments you made originally on



1 your view of delay as an acceptable strategy -- I was wondering  
2 if you might elaborate on that a little.

3 LUBBERS: Well, I don't think delay in and of itself  
4 is a good thing.

5 I mean, obviously, you need to have enough time to  
6 prepare for cases and to argue cases and for the case to  
7 proceed to conclusion, but in some situations, it is certainly  
8 to one party or another's interest to just delay the proceeding  
9 in the hopes that it will never end or that people will give  
10 up, and my only comment was that, you know, I think that, if  
11 that's -- I don't think that's an acceptable goal as part of,  
12 you know, fairness, efficiency, effectiveness, and  
13 acceptability.

14 I don't think it's an appropriate goal in licensing,  
15 and I don't think it's an appropriate thing for people to try  
16 to do to gum up the ability of Federal -- of agencies like OSHA  
17 and EPA to be able to regulate through rule-making.

18 I think that strategy has been part of the regulatory  
19 reform, so-called, movement in Congress, and I think it's been  
20 part of the strategy of at least some people who try to avoid  
21 decisions in other agencies, and I think we should get beyond  
22 that as a strategy.

23 CAMERON: Tony.

24 ROISMAN: First of all, just a point on the delay. I  
25 mean that is sort of built into the democratic process. The

1 Senate still has the filibuster right.

2 LUBBERS: Checks and balances.

3 ROISMAN: And when the shoe's on the other foot, if  
4 it's tort litigation and the defendants are utilities, delay  
5 is a very popular tactic.

6 LUBBERS: Right.

7 ROISMAN: But I had a very different question for  
8 you.

9 What is the difference, as a practical matter, if  
10 any, that you see between an agency that has ALJs and an agency  
11 like the Nuclear Regulatory Commission, which now, I just  
12 learned, has none, no ALJs are now left, although they have  
13 hearing boards and hearing board members who are appointed  
14 through a process, etcetera?

15 Is there some clear delineation between the benefits  
16 and disadvantages of those two?

17 LUBBERS: I've never seen such a study. I mean I  
18 think, first of all, the Administrative Procedure Act  
19 specifically authorizes Congress to provide for different types  
20 of hearing officers, even in APA cases, even informal APA  
21 adjudication.

22 So, if you accept that what the NRC is doing is APA  
23 adjudication, that's what Congress did when it allowed for the  
24 use of panels.

25 You know, I think there are different types or

1 different levels of non-ALJ adjudicators throughout the  
2 government.

3           You've got GS-9 asylum officers deciding asylum cases  
4 in the justice department, and you've got judges who are  
5 actually higher paid than administrative law judges, board of  
6 contract appeals members, deciding those cases.

7           Other agencies allow their non-ALJ adjudicators to be  
8 paid about the same as ALJs, to be as independent as ALJs, at  
9 least by regulation and by practice, so it really depends on  
10 the agency.

11           I used to know more about how the panel worked here,  
12 but my guess is that the panel has most of the ingredients of  
13 independence, if not all, that someone like Judge Heifetz has.

14           Maybe Alan could speak to this question a little  
15 better than I could.

16           HEIFETZ: Well, I can't speak to it in terms of the  
17 NRC, because I don't have the personal knowledge, but there is  
18 a wide variety of adjudicatory systems and reasons for going to  
19 administrative law judges or not.

20           In a number of cases -- for instance, the EEOC, with  
21 a tremendous backlog of cases, they're trying to get through  
22 process very quickly, and the idea is to get as many of these  
23 so-called hearing examiners as they can at a very low rate of  
24 pay -- most of them start out as a hearing examiner right out  
25 of law school, and some of them are capable of doing a very

1 good job, but in another life, when I was doing trial work, I  
2 recall trying an afternoon's case at the EEOC one week, and  
3 that becomes a problem.

4 When you have someone who doesn't have the experience  
5 of managing adjudication, when you have someone who is sitting  
6 there saying I'll let the evidence in for what it's worth,  
7 records tend to get larger, and time gets consumed.

8 So, it depends on the intent of the agency at the  
9 time they decide how to conduct adjudications.

10 There was a comment this morning that substantive  
11 soundness is not concerned with the intent of the Commission,  
12 and perhaps that's true with regard to the Nuclear Regulatory  
13 Commission. As I said, I don't know.

14 But I can tell you that intent does have something to  
15 do with it, because essentially the administrative adjudicatory  
16 process has elements of political structure, and it depends on  
17 who is being appointed to agencies, and if you look at various  
18 agencies and various administrations, you will see whether  
19 there is political influence which is having an impact on  
20 adjudication or not.

21 If you look at an agency like the National Labor  
22 Relations Board, it is basically an adjudicatory agency.  
23 That's what it does. It is not trying to enforce an  
24 administration policy, although there's some tinges to that, I  
25 grant you, but it's not a matter of fostering a particular

1 industry or not.

2 I did some work for the Interstate Commerce  
3 Commission both as an enforcement attorney, an advisor to the  
4 Chairman of the Commission, and an administrative law judge,  
5 and you can see various changes in the results of cases  
6 depending on who was on the Commission and what their  
7 objectives were.

8 Some were much more politically influenced,  
9 result-oriented, if you will, in adjudications, and others were  
10 not.

11 If you have commissioners who are more  
12 result-oriented, they are going to try to get away from  
13 independence in the hearing process, because they can control  
14 the outcome. That's just a human response. That's why they  
15 were put on the commission.

16 So, you can't divorce politics from it. It is not a  
17 court that is there without regard to any policy  
18 considerations.

19 So, if you have appointees to commissions who are  
20 interested straight in adjudication and the search for truth,  
21 as you were talking about in terms of process, then you will  
22 not have that kind of influence.

23 So, the variations are infinite, and you have to be  
24 realistic to understand that there are things that go on in an  
25 administrative adjudication inside the hearing room and outside

1 the hearing room and on the steps of the Capitol.

2 CAMERON: Tony, did your question evidence any  
3 concern about the fact that the NRC does not use administrative  
4 law judges or it was just more a point of information?

5 ROISMAN: No, no. And I thought the answer was what  
6 Jeff and Alan both said, which is that there's nothing magic  
7 about calling someone an ALJ in order to get the qualities that  
8 are built into the ALJ process, but you could have agencies  
9 which don't put those factors into their non-ALJ positions and  
10 end up with bad adjudication as a result.

11 As I said before, I don't think the NRC's one of  
12 those agencies, but it's an issue on which the Commission  
13 always has the power, because they aren't constrained by the  
14 limits of the APA if they don't use ALJs not erode some of the  
15 independence of their boards if they chose to do so.

16 I think that would be a bad -- that's certainly one  
17 of the options that could arguably be on the table here, is  
18 that there would be some attempt to erode the independence of  
19 the licensing boards under broad discretion of the agency as a,  
20 quote, "efficiency move" or whatever.

21 I think it would be a very bad idea, and if anything,  
22 I would argue for moving it the opposite direction, even  
23 thinking about creating the licensing board as  
24 quasi-independent from the agency.

25 LUBBERS: If I could just add one point, I think that

1       there is -- as mentioned in the paper that was distributed by  
2       the staff, administrative law judges are not supposed to be  
3       assigned work that's inconsistent with their role as judge, and  
4       OPM is the one that authorizes agencies to hire administrative  
5       law judges, and if an agency only has non-APA-type  
6       adjudication, they won't get administrative law judges to do  
7       that work.

8               So, NRC does have some flexibility by virtue of  
9       having non-ALJ adjudicators now, so that if they decided to  
10      move to something modified from the APA procedure, they could  
11      use the same hearing officers they have now.

12             CAMERON:  Bob.

13             BACKUS:  I think the issue of who is going to preside  
14      at these adjudications, assuming we're going to continue to  
15      have adjudications, is a very critical one, and I have to  
16      somewhat disagree with Tony.

17             I think some of the presiding officers we were given  
18      on the Seabrook case were an embarrassment, just terrible.  
19      Certainly Judge Bollwerk was not among them.  But there changes  
20      of presiding officers.

21             I think one of the things that needs to be done,  
22      whether they're going to be ALJs or however they are now  
23      selected, which I'll have to talk to Judge Bollwerk and see how  
24      these folks are selected --

25             BOLLWERK:  I'll tell you that if you want to know,

1 but it's up to them. I don't know what kind of record you're  
2 trying to build here.

3 BACKUS: I would be interested in hearing how you  
4 were all selected for your jobs and how you assure  
5 independence, but I think that the assurance that the  
6 fact-finders are neutral independents is a critical part of  
7 improving the process, and as I said, in New Hampshire, if I  
8 have to go to traffic court, I know that the judge that's going  
9 to hear the case has been through a public process to be  
10 confirmed.

11 He has to go through a hearing before a governing  
12 council, and of course, Federal judges have to go through a  
13 Senate confirmation process and there's hearings, and something  
14 to give the public that kind of confidence in the fact-finders  
15 for this agency I think would be very important.

16 CAMERON: Okay. I think I do want to give Paul an  
17 opportunity to talk about how they're selected. I guess we'll  
18 revisit this issue perhaps later on, too, about the -- the who  
19 presides issues. I just had one clarification on that.

20 When you were sort of emphasizing neutrality and  
21 independence, is that the problem that you're calling attention  
22 to in terms of who presides, neutrality and independence, or is  
23 it also expertise?

24 BACKUS: I think it's neutrality and independence  
25 more than expertise, and I don't want to tar everybody that's



1 ever been an administrative -- sat on a ASLB for the NRC, but I  
2 tell you, it's not just my perception, it was the perception of  
3 others that some of these people were sent there with a mission  
4 to get the license issues.

5 CAMERON: Okay. So, it is neutrality.

6 Bollwerk's the only one who survived so far.

7 All right, Paul.

8 BOLLWERK: In terms of the current status of the  
9 agency in terms of having ALJs -- the last ALJ that the agency  
10 had was Ivan Smith, who retired about five years ago. At that  
11 point, it wasn't deemed necessary for the agency to have any  
12 administrative law judges.

13 The only cases that were clearly -- and this goes  
14 back to this whole question about whether it is or isn't on the  
15 record, but there are Program Fraud Civil Remedies Act cases  
16 that potentially could come before the agency. Those require  
17 an ALJ and they're clearly on the record, but we haven't had  
18 any of those in some time. They tend to come and go rather  
19 rapidly.

20 So, at current, we do not have any ALJs.

21 In terms of the administrative judges on the panel,  
22 we are considered independent as a matter of policy. We're not  
23 evaluated.

24 You will not find that in writing anywhere. It's not  
25 in our manual directive. It's not in the regulations. But as

1 a matter of policy, the Commission does not evaluate the  
2 administrative judges.

3 Up until this past year, the chief administrative  
4 judge was a member of the SES and was evaluated on management  
5 issues.

6 As it currently stands, I am not a member of the SES,  
7 so it's not even clear to me how that is going to play out, but  
8 that's a different matter, and I guess I'll find out about that  
9 in the near future.

10 In terms of the selection process -- and in fact,  
11 we're going through this right now -- under the management  
12 directive that governs the panel, there is a register that's  
13 put together of both technical and legal judges, because we do  
14 have both, which makes us unique in the Federal Government to  
15 some degree.

16 The process is like any other Federal hiring process  
17 in that there are a list of rating factors that are put  
18 together, writing samples that are collected.

19 We're asked to address the rating factors, which deal  
20 with things like how much litigation experience do you have,  
21 what is your decision-making ability, your writing ability, all  
22 those sorts of things that you would expect.

23 The rating panel consists of myself, the deputy chief  
24 administrative judge, a technical, and also an OGC  
25 representative, who at this point is the solicitor of the

1 agency.

2 We go through and rate the candidates. We then send  
3 the A candidates to the Commission, and the Commission then  
4 selects who they deem appropriate to be an administrative  
5 judge.

6 So, that's basically how the process works, and all  
7 that is set out in a management directive that governs the  
8 panel's business.

9 ROISMAN: There used to be an advisory panel, which I  
10 gather doesn't exist any longer, on hearing board selections.

11 It was made up of -- I was on it, there were industry  
12 representatives and others on it. ALJs were on it, from other  
13 agencies, I think. And that was when the Commission was  
14 gearing up. There were quite a few judges who went through  
15 that process.

16 Bob, I just want to separate my view from yours,  
17 because I think it's important for us to state them separately.

18 My feeling about judges is that I've had some  
19 terrible judges in my life. Some of them have been appointed  
20 to the Federal bench, some have been appointed to the state  
21 bench, some have been at the NRC, but in every case, I've  
22 always felt like they were judges and that that's just the luck  
23 of the draw.

24 There are terrible jurors out there, you know, and  
25 all that sort of stuff.

1           If the Commission has a process, I would like to see  
2   it go back to having an independent advisory panel on  
3   appointments, particularly if the number judges and  
4   adjudications are going to go up, and I think people can go  
5   through that and -- I'm familiar with some of the problems with  
6   the ALJs in some of the later Seabrook hearings, but you know  
7   that's kind of the -- that's the luck of the draw.

8           I can imagine some utilities that weren't too happy  
9   about some of the administrative law judges that they drew in  
10  cases where they didn't like the way those judges were ruling  
11  and might have thought that they were all pro-intervenor  
12  judges.

13          But all we can hope for is that there is a selection  
14  process and the people who get picked -- that's why I asked the  
15  ALJ question.

16          If people get picked who have a, quote, "judicial  
17  temperament," understand the idea of independence, the fact  
18  that they bring their own biases to the courtroom to some  
19  extent is unavoidable, and there certainly are judges who want  
20  to see the train run on time, and they can be really tough on  
21  you if you're not ready to board the train when the train's  
22  ready to leave the station, but I think all you can have is a  
23  good process out there, and I am convinced from what Jeff said  
24  that labeling the person an ALJ is neither a guarantee that  
25  you'll get a, quote, "good judge" or that you can't get good

1 judges, as long as they have all the other factors.

2 CAMERON: Okay. Thanks for that recommendation,  
3 also, Tony.

4 Diane?

5 CURRAN: I just want to make a follow-up question.

6 I think what you were describing, Judge Bollwerk, was  
7 the process for selecting judges for employment, and one of the  
8 questions that Bob was raising was how do judges get picked to  
9 sit on a particular case. I wonder if you could address that.

10 BOLLWERK: Basically, that's a matter of the chief  
11 administrative judge's discretion, assuming the Commission does  
12 not send the case over to us with a particular judge be  
13 appointed, which the Commission could do, because they have  
14 that authority, as well, but generally, in looking at cases, I  
15 try to decide, you know, what is everybody's case load, who's  
16 got a heavy case load, who might have a little more time, what  
17 the case is going to involve, the usual things that would be  
18 involved in making that sort of determination, and then a panel  
19 is assigned, and I do the same thing with technical judges,  
20 looking at what expertise we need, who's available, what the  
21 case is going to involve, those sorts of things.

22 So, it's, you know, both to match the expertise of  
23 the folks we have as well as the workload.

24 LUBBERS: There is a provision in the APA with  
25 respect to administrative law judges that says that

1 administrative law judges shall be assigned to cases in  
2 rotation so far as practicable. So, it's supposed to be more  
3 random with respect to administrative law judges.

4 Of course, if you only have one or two in the agency  
5 --

6 BOLLWERK: Well, right now, we only have three legal  
7 judges, full-time legal judges, so there's not a lot of  
8 randomness there.

9 Larry Chandler just asked me a question of whether  
10 the Commission had ever appointed a presiding officer, and I'm  
11 going to -- I have a recollection -- if I'm wrong, we need to  
12 correct it -- that back when dealing with -- what's the reactor  
13 up in New York -- in special proceedings, but other than that,  
14 I don't think the Commission has ever appointed a specific  
15 presiding officer.

16 Even the most recent sub-part M case that was sent to  
17 us, which is one of the ones the Commission has indicated they  
18 may doing themselves from time to time, specifically, we were  
19 given the opportunity to appoint whoever we felt was the  
20 appropriate -- I can't remember exactly how that happened, but  
21 there was some consultation about who was available, I know.

22 CAMERON: Okay. Thanks.

23 Jay.

24 SILBERG: Just two points.

25 First, on the ALJ and the presiding officer, hearing

1 examiner route, I think there are unique reasons why the ALJ  
2 process would not work well at the NRC.

3 One is the fact of the three-member board, which I  
4 think has been, over the 30 years or 40 years, it's been a  
5 tremendous benefit to the process in coming up with decisions  
6 that make substantive sense, and I remember at least being told  
7 about what life was like before the technical board members  
8 were appointed, that you were getting technical decisions  
9 written by lawyers who didn't understand physics.

10 I remember one case we had where the two technical  
11 board members overruled the chairman, who was an ALJ, who could  
12 not understand why water would not flow uphill from a cooling  
13 reservoir.

14 So, I think there are unique reasons in the NRC  
15 system. In fact, I'm surprised that more agencies haven't gone  
16 to a bifurcated or trifurcated hearing process, hearing  
17 examiner process, to get the technical input.

18 We're not the only agency that has heavy technical  
19 input necessary on decisions.

20 In terms of the neutrality, you know, I understand  
21 that there were some cases where people thought that they were  
22 being leaned on too much by a particular judge, and it does  
23 work both ways.

24 I think the major problem that I've seen over the  
25 years is not with independence, it's not with the label, but

1       there are -- and it is a problem, I think, that is behind a lot  
2       of why we're here today.

3               There are, frankly, some hearing examiners -- and  
4       mostly I think it's the chairman's role -- who are good at  
5       running hearings, and there are some hearing examiners, the  
6       chairman primarily, who are horrible at running hearings, and  
7       that's not a problem that's unique to the NRC.

8               There are certainly, as Tony said, bad judges  
9       everywhere.

10              You can look back at the O.J. Simpson trial as an  
11       example of how not to run a trial, and I don't know quite how  
12       you can improve that, except if there were perhaps better  
13       oversight and some ability to perhaps remove the most offending  
14       examples and get rid of the chairman who can't run hearings, I  
15       think that would go a long way.

16              I don't know if any of the people that I used to  
17       think of as incapable of running hearings are still on the  
18       panels or not, and I wouldn't address that in any event, but I  
19       think if you had hearing boards that could efficiently run the  
20       process, keep the trains moving, and get on-board or be left  
21       behind, I think a lot of the problems that we're talking about  
22       here today would simply disappear, because we would, from the  
23       industry side, be satisfied knowing that there's a process that  
24       moves along in a timely way.

25              The decision will come out how the decision will come



1 out, and I think, with the kind of technical boards and  
2 chairman who can evaluate the evidence and make a determination  
3 on the record, they will get their shot at having the decision  
4 come out as the record determines.

5 I think, if you could somehow guarantee that, we  
6 wouldn't need all this stuff. The problem is you can't  
7 guarantee it, and therefore, what do we do procedure-wise to  
8 improve the process?

9 CAMERON: Okay. And I think you're bringing up the  
10 case management issue, and when we get further along this  
11 afternoon, when we identify concerns and problems and  
12 underlying causes, case management may perhaps be a fix for  
13 some of those.

14 It will be interesting to see what types of agreement  
15 we get on those types of fixes.

16 Would you agree with Tony on the -- re-instituting  
17 the advisory committee, assuming that there is a need in terms  
18 of new hires?

19 SILBERG: I don't know that I would. I know some of  
20 the people that were appointed. I remember one particular case  
21 where my partner, who was on that committee, came back and was  
22 all excited that the particular candidate that he thought was  
23 great was going to get on, and in hindsight, that turned out to  
24 be not such a great evaluation.

25 I'm happy to let it go with Judge Bollwerk and his

1 cohorts and John Cordes. I don't know it's worked. I don't  
2 think there's the need for the massive infusion of new members  
3 that I think was one of the factors behind setting up the  
4 advisory panel.

5 CAMERON: Bob.

6 BACKUS: Tony's absolutely right. You can get bad  
7 judges anywhere, in state court, Federal court, at the NRC,  
8 EPA, anywhere, and sometimes that is just the luck of the draw.

9 The problem we had with the Seabrook case was that it  
10 was not perceived to be just the luck of the draw. We had one  
11 example of a presiding officer, the lawyer member of the board,  
12 the chairman of the board -- all of the sudden, one day, about  
13 90 percent of the way through the proceeding, he up and left  
14 with no notice, and the next day -- Tony remembers this well,  
15 too -- a new presiding officer came in, and within a day, we  
16 knew we had no chance, and there was never an explanation of  
17 how he got picked and put in there at that point, and so, I  
18 think if the system is fine -- this is maybe a public relations  
19 with the agency -- it's got to explain to the people, these  
20 people don't spring full-blown from the head of Zeus, they have  
21 gone through a process, they are legitimate and they are  
22 neutral, and here's the reason you can believe that.

23 CAMERON: Okay. Thank you, Bob. That was a useful  
24 discussion on judges.

25 I had just one question for Jeff before he sits down.

1           Your chart that you had, the Verkail chart, is mainly  
2   a horizontal estimate, and I take it that, if you look down  
3   vertically through all of these procedural ingredients, that  
4   there would be some programs that had all of these ingredients,  
5   and I guess my point is that some of these ingredients people  
6   would associate more with what people call formal versus  
7   informal.

8           So, going to Mal's point about the usefulness of  
9   using these labels --

10          LUBBERS: Eight of them had at least eight of the  
11   procedures. Two had all had 10, four had nine, two had eight.

12          CAMERON: All right.

13          LUBBERS: It's all in that article.

14          CAMERON: Okay. Thank you.

15          It's almost 12:30, and I thought what I could do is  
16   go and type this up and give everybody a sheet so that we could  
17   come back and discuss this after lunch and then start to go  
18   through some of the concerns or problems that you see with the  
19   hearing process, what the underlying cause of that might be,  
20   and then we can circle back and try to see what fixes are  
21   possible.

22          Does that sound reasonable to everybody to proceed  
23   that way?

24          Paul, do you have a comment?

25          BOLLWERK: Just one other thing for the record. If

1     anybody wants to know about the status of administrative  
2     judges, John Frye, who used to be a licensing board member  
3     several years ago wrote an extensive article about  
4     administrative judges and how they are picked, and it goes into  
5     quite an extensive discussion about it, and that's certainly  
6     out there, if you're interested in that.

7           CAMERON:    Okay.    Thanks for that, Paul.

8           Why don't we take a break for lunch?

9           There's a cafeteria out here that I think most of you  
10     saw.    There's also a larger cafeteria over in the other  
11     building, through the walkway.

12           There's a gourmet food store called Eatzies next door  
13     that is pretty accessible and quick, and there are some other  
14     restaurants around, but why don't we be back by 1:30?

15           [Whereupon, at 12:30 p.m., the meeting was recessed,  
16     to reconvene at 1:30 p.m., this same day.]

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## A F T E R N O O N   S E S S I O N

[1:43 p.m.]

CAMERON: Welcome back.

I passed two things out to you.

One is a -- I think we could call it a straw-man rather than a proposal, right, Ellen? But this is an attempt to at least set a -- sort of define the objectives of the NRC hearing process.

I want to talk about that, and you each have a copy of that, and what I'll do is I'll mark this copy up here, and we'll see where we end up with that.

What I thought it might be instructive to do, then, is to see if we can just brainstorm some concerns, problems that you see with the hearing process, and identify some underlying causes.

People might agree on the concern or the problem, disagree on what the underlying cause is, but we can at least start to go through that, and at some point, either this afternoon or tomorrow, we can talk about what are the fixes for these problems.

Is it a case management fix, or is it something else?

We're going to be sort of walking through the grand solution that Bob brought up this morning, and we will get to this second part of the equation, which is the resources issue, also, and we also want to revisit at some time Tony Roisman's

1 suggestion of the careful evaluation of actual cases to see  
2 what worked, what didn't work. So, we don't want to lose sight  
3 of that.

4 The other thing, speaking of case management, Jeff  
5 Lubbers pointed out to me that, in the Administrative  
6 Conference of the United States, there was a recommendation on  
7 case management as a tool for improving agency allocation.

8 You each have a copy of that, and if we get to the --  
9 when we get to case management, I think that Judge Heifetz  
10 probably wants to put a little bit of grains of salt on this  
11 recommendation.

12 LUBBERS: So do I.

13 CAMERON: Maybe everybody will, but at any rate,  
14 that's what you have.

15 Any questions or comments about how we're going to  
16 proceed for this afternoon?

17 [No response.]

18 CAMERON: Okay.

19 You all have the draft objective, and I broke it down  
20 into a couple of different parts, instead of writing it in one  
21 paragraph, because I think that that will help us to go through  
22 that.

23 No one probably has a problem with the objective of  
24 the NRC hearing process, but Ellen, do you want to say anything  
25 about this before we start to go through it in terms of why you

1 believe it's important to arrive at a common understanding of  
2 what the objective is?

3           You don't need to, I just wanted to give you that  
4 opportunity.

5           GINSBERG: I appreciate the opportunity.

6           I think what we were trying to do was, for ourselves,  
7 try and articulate what we thought the process ought to be in  
8 terms of its objective in order to come up with some  
9 constructive suggestions, and it seemed to us that, to come up  
10 with a list of concerns and then immediate fixes to those  
11 concerns, was to go way too quickly to that process without at  
12 least identifying for ourselves what we wanted to achieve in  
13 the big picture, and that's why we rolled to this kind of broad  
14 statement of what we think is an appropriate objective.

15          CAMERON: Okay.

16          So, I think what you're saying is that, when we get  
17 to this next step of identifying concerns, underlying causes,  
18 alternatives for fixing those, that we should all be checking  
19 back into our objectives, assuming that we can get somewhere on  
20 that.

21          Mal?

22          MURPHY: I'm sure this was inadvertent, but the NRC  
23 staff didn't mean to leave out the parties, did they, provide a  
24 fair opportunity for the parties and interested members of the  
25 public?

1 CAMERON: This is not the NRC staff.

2 SILBERG: I read that as meaning parties were a sub-  
3 group within the interested members of the public.

4 MURPHY: I thought you read it mean that you didn't  
5 have any damn rights at all, Silberg, only the public did.

6 SILBERG: Me personally?

7 CAMERON: Okay.

8 We're into the first bullet here. Mal brought up, is  
9 "interested members of the public" a term that includes  
10 parties, or does that need to be specified out?

11 Mal?

12 MURPHY: It doesn't to me.

13 CAMERON: Just causing trouble here.

14 MURPHY: No. I think, traditionally, most lay  
15 readers, most people who aren't sitting at this table take that  
16 terminology to mean -- "interested members of the public" to  
17 mean those people other than the applicant, the government,  
18 etcetera, and I think that's true in any administrative hearing  
19 process or licensing process, not just before the NRC.

20 If you're going to license a barbershop and you're  
21 talking about the interested members of the public, I think  
22 most people assume you aren't talking about the barber.

23 ROISMAN: Why don't you use your standing language?

24 CAMERON: Ellen, let me check back with you. Comment  
25 on that?



1 GINSBERG: Tony's suggestion is --

2 CAMERON: The suggestion is to provide a fair  
3 opportunity for -- and the exact language is --

4 GINSBERG: -- interested persons?

5 ROISMAN: Anybody who would have standing. Of  
6 course, that would include the applicant, would include the  
7 ACRS.

8 GINSBERG: We've got regulations on the books as we  
9 speak. So, I think we're talking about, within that context,  
10 persons, I think, would be acceptable.

11 CAMERON: What is it, Tony?

12 ROISMAN: The language of the statute Paul points out  
13 is any person whose interest may be affected by the proceeding.

14 CAMERON: Does anybody have any problem with that  
15 substitution, any person whose interest may be affected by the  
16 proceeding? Keep in mind -- you know, I don't want to put too  
17 fine a point on this. This is not necessarily something that  
18 we're drafting for any publication or anything like that.

19 It's trying to get a common understanding around the  
20 table about objective, and indeed, there may be more user-  
21 friendly ways to say some of this stuff.

22 Steve?

23 KOHN: I'm not quite sure what the goal is in terms  
24 of this objective or preamble, but I'm just going to throw out  
25 a couple of things -- and I don't even think -- you know, we

1 can sit around and debate it, but the word "fair," I think is  
2 loaded, because the word "raise," "efficiently," and  
3 "supportable" -- and I'll just start from the top.

4 "Fair." Does "fair" mean cross-examination and the  
5 trappings of due process essential to reach a sound scientific  
6 decision, or is "fair" allowing us to chat?

7 "Efficiently." Does "efficient" mean the time  
8 necessary for world-class experts to carefully review extremely  
9 complex scientific issues, or does "efficiently" mean an  
10 arbitrary deadline and run?

11 "Supportable." Does "supportable" mean the best  
12 science, or does "supportable" mean get a C, kick it to the  
13 next phase, and that's really, I think, what we're actually  
14 debating here, because if you downgrade this process, you'll  
15 get the low road.

16 If you upgrade it, you may get the best science, and  
17 I just want to just put forward -- I'm representing a great  
18 scientist at EPA, not through the Whistle-Blower Center but in  
19 a personal capacity, how has just pounded into me the  
20 importance of good, sound science, and unless an adjudicatory  
21 process that deals with extremely technical and important  
22 issues can bring that fundamental concern of good science into  
23 the adjudicatory process, I think in the next phase of  
24 licensing process, we're out of it.

25 So, I'd like to see the word in here "good science,

1 world-class."

2 CAMERON: I'm going to make a note of "good science,  
3 world-class," but the question I had for you is, although it's  
4 very important to define what "fair," for example, means, do  
5 you need to define that before you would say that that was --  
6 that that's an objective of the hearing process?

7 In other words, would you want to debate whether a  
8 fair opportunity should be an objective of the hearing process?

9 KOHN: I think the bottom line is fair may not be  
10 good enough. It depends on how you define it, but fair in the  
11 context of atomic energy and the scientific issues it raises --  
12 and I say this from a lot of my clients who are experts in  
13 nuclear power -- fair or do you want excellent? Do you want C  
14 or do you want A?

15 CAMERON: Okay.

16 Joe?

17 GRAY: I think the reference to fair is a reference  
18 to just, not moderate, fair, or excellent.

19 As you've stated it, you can define away the problem  
20 or define into the thing, the problem, by talking about fair as  
21 meaning the right to cross examination, the right to extensive  
22 discovery, the right to funding for all parties so that they  
23 can come up with expert witnesses and whatnot.

24 I don't think that is the -- I don't think the real  
25 intent here is to define fair at the beginning in such a way as

1 to assume away the problem.

2 CAMERON: Okay. Thanks, Joe.

3 Let's go to George and then Susan and then we'll come  
4 over to Bob.

5 George?

6 EDGAR: I'll beg your indulgence first, because I  
7 missed a significant portion of the morning, and if I am on the  
8 wrong step, tell me, but before we get to an argument about  
9 what the adjectives are, does this objective define what we  
10 want the hearing process to do?

11 Tony will remember that, in '82, we went through a  
12 re-examination of the hearing process, and there's a  
13 fundamental question about what do you want it to do, what's  
14 its purpose?

15 Are you trying to resolve disputes, are you trying to  
16 educate the public, are you trying to inform the staff, or all  
17 of the above? What's your underlying purposes here?

18 Once you define that, a lot of other segments of the  
19 hearing process then have to be defined in different ways.

20 I'm assuming from this definition that the purpose  
21 here is dispute resolution. Is that a fundamental on which  
22 everyone agrees?

23 GINSBERG: George, you missed this early part of the  
24 discussion. I proposed this just as an example of what we  
25 kicked about in discussions we've had as a way of preparing for

1       this meeting, and Chip chose to use it as a straw-man so that  
2       we could get the discussion going.

3               But this is not a group effort. This was something  
4       that we had prepared, that I brought with me and used as an  
5       example of trying to focus on the objective, as you say, of  
6       what the hearing process is intended to do, rather than to try  
7       and fix ills that people identify before we've identified the  
8       objective.

9               CAMERON: Does anybody have a comment on George's  
10       three possible purposes, or George, do you want to say some  
11       more? Go ahead?

12              EDGAR: What is the hearing process for? Is it to  
13       resolve disputes raised by the parties? Is it to educate the  
14       public? Is it to inform the staff, who's the ultimate  
15       decision-maker or the person who issues the license, or all of  
16       the above? And it makes a difference than how you set the  
17       process in motion, depending upon what you choose for a  
18       purpose, and all I'm saying is that there isn't a crisp  
19       definition of why we're here within this. It's implied, I  
20       think.

21              I think what's implied in this statement is disputes  
22       resolution.

23              CAMERON: Larry, do you want to comment on that?

24              CHANDLER: Given the basic structure of, certainly,  
25       current practice, I think the emphasis would be on dispute

1 resolution.

2 By its very nature, the issues that are brought  
3 before any of the Commission's tribunals in this regard, but  
4 for the mandatory hearings and construction permits, are  
5 confined to issues in controversy.

6 So, in terms of education of the public, certainly,  
7 and to an extent, as well, the staff, the airing of issues will  
8 be limited to those which are admitted as contentions or areas  
9 of concern or whatever.

10 So, its primary focus, I would think, would have to  
11 be in terms of dispute resolution.

12 CAMERON: In that context, George, do you have any  
13 comments on the straw-man objective up there at all at this  
14 point?

15 EDGAR: Well, I would reverse the logic and describe  
16 the objective of the process as to provide an efficient and  
17 effective mechanism for resolution of disputes placed in  
18 controversy by the parties.

19 CAMERON: Okay.

20 Susan?

21 HIATT: I think I could support that definition, but  
22 I think what's going to happen is people are going to start  
23 quibbling about definitions, like what do you mean by fair, and  
24 I wonder if the industry would support the outcome in a  
25 particular case if the legally and technically supportable

1 substantive conclusion is denial of the license, or does that  
2 particular example then get paraded out as an example of how  
3 the process doesn't work and it's not fair?

4 CAMERON: Could we have some comments on that? And  
5 I'm hoping that -- this audio system here is not working as  
6 well as it should, I don't think, and I don't know if everybody  
7 heard Susan on that, but Ellen, did you have a response or a  
8 question for Susan?

9 GINSBERG: Yeah. The industry's objective is not to  
10 have a preordained outcome. I think we need to set that out at  
11 the outset here.

12 The industry believes that it submits applications  
13 that are subjected to scrutiny by interested parties and the  
14 staff, they address the questions, to the extent that they are  
15 brought to their attention through this process, and then the  
16 result is what the result is.

17 You know, we talked before about the decision-makers  
18 have separation or independence from the agency staff itself.  
19 We do not believe that this process is designed to preordain  
20 the outcome, and we're not looking for that result.

21 We are looking for a fair, efficient, timely, legally  
22 and technically supportable results, and that's what the  
23 process we're looking for -- those would be the features of the  
24 process we're looking for.

25 HIATT: Well if I could follow up, could I have like

1 a guarantee here that, if we have a process and a system where  
2 the license gets denied, you won't be going back to Congress  
3 and say you've got to change that Atomic Energy Act?

4 RICCIO: That's one-step licensing.

5 GINSBERG: Obviously, that's a question that I think  
6 is not going to be fruitful to discuss here.

7 CAMERON: Okay.

8 Jim and then Bob Backus.

9 RICCIO: I just wanted to address George's question  
10 of why we're really here. We're here because the Senate  
11 oversight committee was given the impression by the industry  
12 that the hearing process was unnecessarily burdening them in  
13 getting done what they wanted to do, and they marched out the  
14 LES case and they marched out the Vogtle case, and that's why  
15 we're here today discussing this, and as much as I don't want  
16 to -- I respect what you have to say, but the reality is, when  
17 we had a legitimate process for license renewal and we showed a  
18 non-biased judge that not only should Yankee Rowe not have been  
19 operating into the future, they shouldn't have been operating  
20 in the present, that the license was basically -- you guys came  
21 back in and you rewrote the rules for license renewal, and now  
22 Steve has to basically battle to get any contentions in in  
23 court.

24 So, when we're here talking about what are we really  
25 here doing, we're here basically answering the chain that was



1 pulled on NRC for having half its budget cut.

2           You know NRC was threatened with having half its  
3 budget cut by the Senate oversight committee, and that's why  
4 we're here, and you know, as much as I think the process  
5 doesn't work, it's not because the process was set up  
6 improperly.

7           CAMERON: Okay.

8           Jim, you're going to get a chance to put some of  
9 those reasons for why you think it doesn't work on the board  
10 here as soon as we're done with this topic, which is probably  
11 going to be sooner rather than later.

12          Bob?

13          BACKUS: To get back to what George said about the  
14 goals, I would certainly agree that the primary goal of the  
15 hearing process and certainly the adjudicatory process is  
16 dispute resolution. I don't think that's the only goal.

17          I think another part of the goal is to assure the  
18 public and have the public perceive that they have a meaningful  
19 opportunity for participation.

20          I know there's other avenues for participation, but I  
21 think this is an important one, and I think that's part of the  
22 goals, and in that regard, I think there's something missing  
23 between the first and second clauses that were proposed here,  
24 and that is not only should the public have a fair -- or the  
25 persons whose interest may be affected have an opportunity to

1 raise issues, but they also should provide that those issues  
2 will be neutrally addressed and -- neutrally and objectively  
3 assessed and addressed. That's what I think is missing.

4 It's not just -- we don't want to just have an  
5 opportunity to get up and have our say and be told thank you  
6 for your participation and you're gone; we want to have the  
7 issues properly resolved through the process that we agree  
8 should be used.

9 CAMERON: I guess that we could accomplish that by  
10 inserting something in here for the NRC to objectively and  
11 independently -- objectively, independently, and efficiently  
12 reach legally?

13 BACKUS: Address those issues in an objective and  
14 independent manner, yes.

15 CAMERON: All right.

16 Tony?

17 ROISMAN: I agree with Bob. I think the second  
18 purpose of this is to do it in a manner that makes the  
19 decisions acceptable.

20 I mean it would be unacceptable for all of us if you  
21 went through all of this and then people started tearing down  
22 nuclear reactor buildings because they didn't believe the  
23 process had been fair enough and they didn't think that they  
24 had a chance to participate.

25 But I think there's another objective which wouldn't

1     apply if this were not nuclear power plants, and that is the  
2     objective is to get it right, because the price of getting it  
3     wrong is too high, and so, although I think I like the idea of  
4     us looking at these bullet by bullet, I think "supportable" is  
5     not the word.

6             It's not is it supportable? That says there's a  
7     range of decisions that you could reach, all of which are okay  
8     and one of which might include TMI's accident, and I think  
9     that's wrong.

10            I mean it may happen, but I guess I sort of have a  
11     Rickover view of the licensing process. It should have as its  
12     goal zero tolerance.

13            The goal of the process should be to never make a  
14     mistake on these kinds of issues, because I don't think there's  
15     room in this technology for that, and I think one of the flaws  
16     in the industry's ability to make the public accept nuclear  
17     power sort of outside the hearing process is the perception  
18     that they somehow or another could tolerate, and after TMI, a  
19     lot of people would have said, well, that's the end of nuclear  
20     power, and a lot of people did say, oh, that's the end of  
21     nuclear power, but they still operate and they still want to be  
22     relicensed, etcetera, etcetera.

23            So, the public has got to come to a realization and  
24     the process has to be altered so that the end result is that  
25     there is as high a probability as possible that you could come

1 to the right decision, and those of you concerned with waste  
2 disposal, I think it's even -- the burden is even higher on you  
3 than it is on operating nuclear plants, because that's really  
4 where the crunch is coming. That's what people are concerned  
5 with.

6 Now, we could have without -- you know, we wouldn't  
7 have enough time if we started now and went through the end of  
8 tomorrow to discuss the issue of risk perception, but the truth  
9 is that a technology that has a low probability, high  
10 consequence, which provides marginally very little additional  
11 benefit to the people who are in that range, that may suffer  
12 the adverse risk, has a very hard row to hoe, and the way for  
13 that kind of a technology to make it in a democratic society is  
14 to set the bar for itself very high.

15 So, I would not -- when we get down to -- I don't  
16 know whether --

17 CAMERON: I'd put "correct" for now as sort of a  
18 placeholder on that.

19 ROISMAN: So, that would be a third purpose that  
20 would come in, in addition to the purpose that Bob added about  
21 just sort of public acceptability of the process.

22 CAMERON: All right. Get it right.

23 ROISMAN: Yeah. Set it as your goal to get it right.

24 CAMERON: Larry, do you want to comment?

25 CHANDLER: Yeah. A couple of points, if I might.

1           I couldn't agree more that -- although my answer to  
2       George before was that the principle purpose here of  
3       adjudications is dispute resolution, there has to be public  
4       confidence in the process, the integrity of the process to  
5       reach sound decisions.

6           On the other hand -- and Steve Kohn made some  
7       comments earlier this morning about it, in reaction to what  
8       Tony was just talking about -- I have a concern that we not  
9       sort of superimpose through the adjudicatory hearing process  
10      substantive standards that differ from those that are found in  
11      the Commission's substantive regulations.

12           The fundamental safety standards objectives are those  
13      set forth in Part 50 for reactors. We're not only talking  
14      reactors.

15           We're talking about procedures here that will have  
16      application beyond just reactors. We'll be talking about  
17      materials licenses, waste, the panoply of different activities  
18      in which we engage.

19           There are our fundamental evidentiary standards that  
20      we've long accepted and the judicial process accepts as  
21      sufficient, and while we may talk, you know, world class and  
22      zero tolerance, there are standards set by statute, there are  
23      standards set by the Commission's regulations, in its  
24      substantive regulations, that we ought not be tinkering with  
25      when we consider how the hearing process ought to be made as

1       defensible and as well-structured as possible to fit the needs  
2       and objectives of all participants, any person whose interest  
3       may be affected.

4               Just an observation.

5               Going back to the structure, maybe looking a step  
6       ahead of where we were in our conversation, what I was going to  
7       suggest when we look at these several bullets, these three  
8       pieces, is perhaps thinking about the process in terms of the  
9       process.

10              Namely, when you go through, however we wish to  
11       phrase, to provide a fair opportunity, etcetera, what we're  
12       looking at is several different stages of a process.

13              Translation: What does it take, what should it take  
14       for any interested person to participate? Standing,  
15       contentions, those kinds of issues. The intervention process.

16              Next you get into a pre-hearing process to raise  
17       well-defined issues that are within the scope.

18              Fair has implications on both sides. Fair is sort of  
19       the equity, the point that Joe Gray was alluding to before, an  
20       equitable opportunity to participate.

21              It also implicates some of the concerns that Tony and  
22       Bob Backus were talking about earlier in terms of funding.

23              So, if you look, you can structure concerns relative  
24       to various stages of the process that might help frame a  
25       discussion for what we currently have on the books by way of

1 process and what we might think of in terms of changes, if  
2 appropriate, to that -- to improve upon the process.

3 Is it broke? What needs to be fixed? What are the  
4 kind of fixes?

5 CAMERON: Okay. I think we're going to get to that,  
6 what is broke, but you're taking us to the matrix.

7 CHANDLER: Yeah.

8 CAMERON: Okay.

9 Joe?

10 GRAY: I just wanted to follow up on what Tony  
11 Roisman said. I really think that, beyond simple dispute  
12 resolution and ideas of public confidence, the real fundamental  
13 goal ought to be to generate a sound record on which an  
14 accurate decision can be made on issues in dispute, and I can't  
15 conceive of another goal that would take precedence over that.

16 CAMERON: Tony, do you have any problems with sound  
17 record to make an accurate decision? I'm sorry I'm not getting  
18 all this up here.

19 ROISMAN: In the abstract, no, but I've tried to  
20 follow your bullets. I haven't gotten to even bullet number  
21 two, which it seems to me raise well-defined issues is only  
22 half of it -- raise and effectively pursue.

23 CAMERON: Okay.

24 ROISMAN: And here, I'm using "effectively" the way I  
25 think everybody has used that phrase when they talked about an

1 effective system.

2 Effectively, that is fully ventilate. You don't have  
3 an issue which doesn't get adequately pursued, and because it  
4 wasn't adequately pursued, as Larry points out, the Commission  
5 has rules and there are burdens of proof and so forth.

6 Someone raises a perfectly legitimate point, but  
7 they're not able to make the full record on it, so they lose on  
8 the burden of proof, but the point is still just as good as it  
9 was, but they didn't have the time to get the issue fully  
10 developed.

11 So, I don't know whether it's a sound record.  
12 Complete record, from my perspective, might be better.

13 CAMERON: Okay. And I think what you're doing is  
14 putting sort of a gloss on fair a la what Steve was talking  
15 about, in a sense. "Effectively pursue" would be an aspect of  
16 fairness, I would imagine.

17 ROISMAN: The reason I like this -- and maybe fair  
18 and meaningful might be a good way to flesh that out, but the  
19 reason I like the way you wrote the bullet up is I like that  
20 word "opportunity," because that's sort of the starting point.

21 We'd all agree that if you put a licensing notice in  
22 the Federal Register on a Monday and you had to have your  
23 contentions in by Tuesday, that no one would say you had a fair  
24 opportunity.

25 You could have all the funding in the world you



1 wanted; you could have the best experts in the world. Between  
2 Monday and Tuesday, you couldn't get them.

3 So, opportunity carries a certain connotation.

4 The second paragraph, I think, or the second bullet,  
5 deals with sort of the substantive processes, and the third  
6 bullet deals with the consequences of doing that.

7 First, you've got a fair change, then you get this  
8 record fully developed and you both raise and develop the  
9 issues, and then you get a result. At least that's how I saw  
10 it.

11 CAMERON: Hopefully the right one.

12 ROISMAN: Right. Yes, hopefully the right one.

13 CAMERON: Okay. Thank you.

14 Mike, did you want to say something?

15 MCGARRY: I agree with Larry. Larry made the point I  
16 was going to.

17 CAMERON: Okay.

18 Jay?

19 SILBERG: One thing I think we tend to be losing  
20 track of is that the hearing process is not the major route for  
21 NRC to make a determination an activity is safe.

22 We've totally disregarded the fact that, before you  
23 get into the hearing process, except in the enforcement arena,  
24 there has been a very thorough soup-to-nuts review. Some  
25 people will say the standards are wrong, some people will say

1 the staff doesn't do a good job, but there is a staff review  
2 Congress has chartered that agency as doing it right, and there  
3 are mechanisms to correct that if it's not done right.

4 The public acceptability issue, I think you're  
5 putting too big a burden on the hearing process. Public  
6 acceptability of nuclear power is something -- Congress has  
7 made at least the initial decision. It ought not to be up to a  
8 licensing board to make publicly acceptable nuclear power.

9 There has been a governmental decision that it's  
10 determined to be safe, and if it's determined to be  
11 environmentally acceptable, then nuclear power is entitled to  
12 have its place in the sun, and I think, for us to look at the  
13 hearing process as the sole mechanism for assuring public  
14 acceptability or even a significant method for assuring public  
15 acceptability is really to put a shoe on a different horse.

16 The issue is, when people come in and they are  
17 unhappy with the folks that Congress has chartered as having  
18 primary responsibility to carry out the safety review, how do  
19 we assure that those folks are given a fair opportunity to  
20 bring issues to the fore and have those issues determined, but  
21 it is not to determine whether nuclear power is or is not the  
22 thing that our society should have.

23 CAMERON: I'm not sure -- Tony, you can correct me on  
24 this.

25 I wasn't sure that -- "public acceptance" may be the

1 wrong term. I thought that this point was going towards public  
2 confidence that the correct decision was made because of other  
3 attributes to the process. Is that what you meant, rather than  
4 public acceptance of nuclear power?

5 ROISMAN: I think that's fair, but I don't agree with  
6 Jay's perception of what the Congress has done.

7 To begin with, in all deference to the Congress, I  
8 don't think there's a member of Congress that has the foggiest  
9 idea what's involved in either building, operating, or using a  
10 nuclear power plant.

11 So, if we were to defer to their judgement that  
12 authorizing the licensing of the plants they'd somehow or  
13 another made them publicly acceptable, we would be making a  
14 huge mistake, and the existence of the Commission and all of  
15 its staff and all of the people who work in it is evidence of  
16 the fact that the Congress at least leaves open, I would hope,  
17 equally the possibility that there would never be a nuclear  
18 power plant, as well as a possibility that there would be that  
19 once dreamed of thousand nuclear power plants, and that this  
20 whole process was designed for Congress to say you guys figure  
21 it out and we'll go along with you.

22 If you say one's okay, then it's okay. If you say  
23 it's not okay, then it's not okay.

24 SILBERG: And that's what I said, if they meet the  
25 standards, if they meet the safety requirement, then it ought

1 to go ahead. That is the function, primarily, of the staff's  
2 review.

3 ROISMAN: Right, but --

4 SILBERG: This hearing process is a check, if you  
5 will, on that, and it is not to supersede it.

6 ROISMAN: But we can't lose track of the fact that a  
7 significant reason why nuclear power is currently in all the  
8 trouble that it's in is the issue of public acceptability.

9 So, all those things may be true, and as a lawyer, I  
10 think I agree with you. The process is there; you go through  
11 the process.

12 The truth is that the thing that is crippling the  
13 nuclear industry and has at least since TMI, if not before  
14 that, is that the public doesn't have any confidence in this  
15 technology, and if the public had confidence in it, it would be  
16 like licensing airplanes.

17 CAMERON: Okay.

18 Let's go to Tony. He's had his card up for a while,  
19 and then Bob, and then we'll come back to Larry and then Ellen,  
20 and Mal, and then I think we may try to conclude this and go on  
21 to identifying some concerns and problems.

22 Tony.

23 THOMPSON: I think I agree with something that Larry  
24 said. We're dealing here with more than just reactors when we  
25 talk about the hearing process, and we are dealing with

1 standards that the licensee and the affected or interested  
2 members of the public have to deal with.

3 For example, uranium mill tailings -- standards were  
4 created by EPA, and NRC had to conform its standards, and the  
5 standard for site closure is 1,000 years without active  
6 maintenance.

7 Now, I can tell you that industry went into the rule-  
8 making and litigated and lost on the fact that you can't be  
9 anywhere -- any kind of sure that you can go for 1,000 years  
10 without active maintenance, but that's the standard. So, now  
11 we have to live with that.

12 Now, the standard that you apply to determining  
13 whether something's going to last a thousand years without  
14 active maintenance is reasonable assurance, because you're  
15 talking about probabilities over a long period of time.

16 So, the question is how does risk information about  
17 the subject of the license play into the hearing process? Do  
18 you require the same level of scrutiny? Do you require the  
19 same kinds of zero tolerance for something that is essentially  
20 low-risk and low-probability?

21 And that's a question that we haven't addressed  
22 because we're all talking about reactors, but there are  
23 licenses and license practices within the ambit of the Atomic  
24 Energy Act, NRC, that are relatively low-risk and low-  
25 probability, and so, you have to recognize the hearing process,

1 seems to me, to be efficient, has to deal with that and  
2 recognize that.

3 CAMERON: Okay. That's getting us into this idea of  
4 are there certain licensed activities or activities to be  
5 licensed that should have a particular process associated with  
6 it, which hopefully we'll get to tomorrow.

7 Bob?

8 BACKUS: Jay's comment led me back to the issue of a  
9 grand bargain, one part of which I think could involve the  
10 Atomic Energy Act. Jay is perfectly correct. The Atomic  
11 Energy Act said that this technology should be supported and  
12 advanced.

13 Of course, that act was passed before any commercial  
14 reactor was in operation, before TMI, before Chernobyl. God  
15 knows it was before we had electric deregulation when all the  
16 electric generators are supposed to be competing in the  
17 marketplace.

18 I wonder what the industry would think if we gave  
19 them something like deadlines on proceedings, and in return,  
20 when the Commission sends its legislative package to Congress,  
21 it includes repeal of the promotional language in the Atomic  
22 Energy Act.

23 I think the Commission may have some influence with  
24 language that Congress considers.

25 CAMERON: Okay.

1 Tony, do you want to put that on the record?

2 THOMPSON: I would just say that the Commission has  
3 to take any legislation to Congress. It's got to go through  
4 OMB, first of all, and second of all, the promotional  
5 responsibilities under the Atomic Energy Act were separated  
6 from the Commission in 1974 and given to ERTA and later to DOE.

7 Now, you can argue that the Commission looks  
8 favorably on licensing activities, if you want, but there's no  
9 formal statutory basis for them promoting atomic energy.

10 CAMERON: Okay. Thanks, Tony.

11 Let's hear from Mal and then Larry and close up with  
12 Susan and see if anybody out there in the audience has  
13 something to say, and we'll go to Ellen, too.

14 Mal?

15 MURPHY: Yeah. Tony Roisman covered most of the  
16 point I was going to make, and that is, from Jay's points for  
17 discussion, I think what this language should be referring to  
18 and what we should be talking about here for the next day-and-  
19 a-half is the public acceptance or public confidence in the  
20 particular decision which results from the hearing, not public  
21 acceptance of nuclear power in general or, in my case, public  
22 acceptance of deep geologic disposal, but is the public  
23 confident that this decision is at least arguably correct, and  
24 I disagree with Jay in that the way the hearing is conducted,  
25 openness, inclusiveness, fairness, however you want to define

1 it, etcetera, I think is absolutely critical to that.

2 I mean without a full, open, all-inclusive, complete,  
3 fair, etcetera, hearing using all or most of, I think, the  
4 traditional panoply of hearing tools, I think there's very  
5 little chance that the public would -- or at least a large  
6 segment of the public would ever have confidence in the case of  
7 the high-level waste repository that the decision was correct.

8 So, it seems to me that's a fundamental aspect or  
9 attribute of the hearing process.

10 CAMERON: It may be different for the type of  
11 facility that Tony Thompson is talking about, but we need to  
12 talk about that.

13 MURPHY: I think the public acceptance, public  
14 confidence is very, very important, at least in terms of the  
15 nuclear waste side of this.

16 CAMERON: And the question is what gives the public  
17 confidence? What needs to be in the hearing process to give  
18 the public confidence of that?

19 Larry and then Susan and the last comment from Jim.

20 Ellen, you're done, right?

21 GINSBERG: Well every time I think I have something  
22 to say, someone else either addresses it or -- so, I'll wait.

23 CAMERON: We planned that.

24 Larry.

25 CHANDLER: Having circled the word "supportable"



1 before and inserted the word "correct," I'd suggest using the  
2 word "sound" as an alternative, reach legally and technically  
3 sound substantive conclusions.

4 CAMERON: All right.

5 We plan to send this chart up to the Commission.

6 CHANDLER: With arrows, I hope.

7 I wanted to pick up on a point that Jay made, and  
8 it's a little concern I would have.

9 I think the opportunity for hearings is not to focus  
10 on whether -- provide an opportunity for anyone to question the  
11 staff's -- the soundness of the staff's activities.

12 The opportunity is there to challenge the sufficiency  
13 of the application that's before the Commission, not the  
14 staff's review of that.

15 CAMERON: Okay.

16 Susan.

17 HIATT: I just wanted to make a comment about the  
18 promotional language in the Atomic Energy Act.

19 I can recall an ACRS letter report issued around the  
20 mid-'80s that went something to the effect that, well, you  
21 know, you have this population of reactors and accidents will  
22 happen and people will die and that will be a tragedy, not  
23 because people would die but because the resulting lack of  
24 public confidence in nuclear power would frustrate the  
25 congressional intention.

1           So, maybe there is some connection here with what the  
2           supposedly neutral regulator does.

3           CAMERON: So, you're suggesting that, even though the  
4           promotional language in the Atomic Energy Act may apply to  
5           another agency, that occasionally either the advisory committee  
6           or someone else connected to the Commission may give people the  
7           perception that we're still promoting.

8           HIATT: That's correct.

9           CAMERON: All right.

10          Jim?

11          RICCIO: We've heard from different ends of the table  
12          that public confidence is important. I just want to draw us  
13          back to the reason, again, why we're here.

14          I fail to see how circumscribing our rights to cross-  
15          examination and discovery is going to enhance public confidence  
16          in either the repository or the closure of a uranium mine or  
17          the further operation of a nuclear power plant, and not to  
18          harken back to the SRM, but you know, the Commission has  
19          already set out its direction.

20          You know, they want to dual track legislation and  
21          rule change. They want to circumscribe the rights of the  
22          public.

23          So, this talk about, you know, wouldn't it be nice to  
24          have a hearing process that would make us believe in nuclear  
25          power is a bit off the beaten track, and as much as I like

1 Bob's idea of a grand bargain, I have very little confidence  
2 that, once that grand bargain is sent up to the Congress, that  
3 we're not just going to see another instance where the public's  
4 rights are shunted aside in order to provide the industry with  
5 reliability in the licensing process.

6 CAMERON: Let me try to put a little context on the  
7 grand bargain, as Bob termed it.

8 It may be that that grand bargain, if, indeed, such a  
9 bargain was arrived at, that there may not be any need for any  
10 legislative blessing, okay?

11 The second part of the equation on resources,  
12 depending on how that was done, that may need some sort of  
13 legislative blessing, but it doesn't necessarily need to be a  
14 bargain that would need to go to the Congress.

15 I thought you were going to say whether the  
16 Commission -- if this group ever arrived at that, whether it  
17 would be something acceptable to the Commission.

18 Ellen?

19 GINSBERG: There were two points that I think need to  
20 be made, because we talk a lot about the industry, and there  
21 are people speaking for the industry, and I feel obligated to  
22 make sure I put on the record what I think the industry's view  
23 on some of these issues are.

24 I think, for sure, the industry believes that a very  
25 critical aspect, critical objective of this process is to

1 generate a sound record on which an accurate decision can be  
2 made.

3 Tony made that point earlier. We can use a whole  
4 host of different words to craft that concept, and whatever  
5 words we use, I think that's the concept that -- that is where  
6 the industry is driving. So, that's one point.

7 With respect to the promotional issue, I think it's  
8 important -- and I have a personal experience, working as a law  
9 clerk, right out of law school, for the licensing board, and I  
10 can assure you that, when we looked at these controversial  
11 cases -- and it was more dinners and more late nights than I  
12 care to mention -- never was the issue of promoting the  
13 industry -- at that point, I barely understood what the  
14 industry was -- was that an issue. That just wasn't the issue.

15 They sat around, they looked at the piping issues,  
16 they looked at the feedwater issues. Whatever the issue was,  
17 that was the subject of discussion.

18 I just think it's important to give you that insight.  
19 At least that was my experience, and I think it's an important  
20 set of facts to bear in mind. Paul can talk to the same issue  
21 if he chooses.

22 CAMERON: Okay.

23 And Paul, do you want to add anything?

24 Oh, Jill, I'm sorry. Go ahead.

25 ZAMEK: I'm concerned about all the attention that's

1 being placed on public perception, because I don't think that  
2 that really has a role in the hearing process and why we're  
3 here discussing what's going to change, because when I go to  
4 intervene with my -- against the nuclear power plant in my back  
5 yard, I'm not really concerned about public perception of  
6 nuclear power or any of that.

7 What I'm interested in is public safety, my safety,  
8 my family's safety, and nobody's talking about that, ensuring  
9 public safety, which is supposed to be what this is all about.

10 CAMERON: I would hope that we could -- there's  
11 probably a better way along those lines to say it -- a  
12 technically sound correct decision, Tony Roisman's get it  
13 right, is that translates into it would be safe. Is that  
14 right?

15 ROISMAN: Right.

16 CAMERON: Okay.

17 THOMPSON: You're talking about developing an  
18 adequate record to make a sound decision that assures  
19 protection of public health and safety. I agree. That's the  
20 end result. That's the goal.

21 ZAMEK: Public perception should not be an issue  
22 here.

23 THOMPSON: Because the public might perceive  
24 something as safe and it's not or the public might perceive  
25 something as not safe and it is, and the decision is supposed

1 to be based on the compliance with the regulations, the  
2 technical components, and that assure adequate protection of  
3 public health and safety.

4 CAMERON: So, perception doesn't have any --

5 ZAMEK: -- bearing on the hearing process.

6 CAMERON: Okay.

7 One more comment and then I'm going to go back to  
8 Jill and Diane on something.

9 MURPHY: I beg to differ. In my case, at least,  
10 public perception has an enormous amount to do with it. One of  
11 the things that the people of Nye County, Nevada, for example,  
12 are concerned about is how the public and the rest of the  
13 country and the rest of the world is going to view this  
14 repository having -- what effect it's going to have on their  
15 land.

16 Out in the Amargosa Valley -- you've been there, Chip  
17 -- is the largest dairy in the State of Nevada, which the  
18 Department of Energy, incidentally, forgets to even mention in  
19 the draft EIS, but that's okay.

20 How the people in Los Angeles who buy milk perceive  
21 the safety decision made by an Atomic Safety and Licensing  
22 Board on licensing the Yucca Mountain repository is very  
23 important to the people who run that dairy, not just have they  
24 complied with the Atomic Energy Act standard of protecting to  
25 the public health and safety, but to the people who buy the

1 milk that that dairy produces or the people in Los Angeles who  
2 buy the hay that's produced by the Amargosa farms -- are they  
3 confident that this decision is the correct one?

4 That's very important to the people who live in that  
5 valley.

6 CAMERON: Yes, it is. Are you going back to the  
7 public confidence as the bottom line?

8 MURPHY: It's a very integral, inseparable part of  
9 the hearing process. The public -- it seems to me that the  
10 Commission has to construct -- not to say that they don't have  
11 one already. I mean I'm not conceding that there's in any way  
12 any need to change the process you already have, but the  
13 Commission has to have in place a process which will not only  
14 allow for the -- not only allow the agency to arrive at the  
15 correct decision with respect to public health and safety but  
16 allow the public to feel, to believe, to have confidence in the  
17 fact that they have, indeed, arrived at the correct decision  
18 with respect to public health and safety.

19 There should be more than one objective. One is to  
20 license the power plant, if, indeed, it is safe, and the second  
21 is not to make people feel uncomfortable about it, if that's  
22 possible.

23 It seems to me that that's unavoidable, and if you  
24 have a hearing process which makes a correct decision from the  
25 point of view of the physics involved but scares the bejesus

1 out of everybody within 100 miles, there's something wrong with  
2 that process.

3 CAMERON: Okay. That's an interesting thought to try  
4 to figure out how to deal with.

5 Jill, do you have a comment on that?

6 ZAMEK: When I think of public perception and  
7 persuading people to think a certain way, I think of  
8 propaganda, and that's where I don't want to head, you know,  
9 with all the focus on what the public thinks, you know, brush  
10 over the real issues so that they feel good about this.

11 CAMERON: I think that perhaps you and Mal are using  
12 public perception in perhaps two different ways. You're  
13 thinking about it as the spin, propaganda.

14 MURPHY: I'm thinking about it in terms of can we  
15 cross examine their scientists, for example.

16 MCGARRY: Isn't public perception, at least in the  
17 sense that Mal is using it, the outgrowth of a fair and  
18 meaningful opportunity, some of the words Tony used, a sound  
19 and correct record that objectively and independently and  
20 efficiently examines the issue? I think that's the natural  
21 outgrowth.

22 CAMERON: That's what I would have thought would go  
23 to your point, Mal, and I didn't know whether you had any other  
24 suggestions that you could have a sound, etcetera, etcetera,  
25 decision but still not have a -- not scare the bejesus out of



1 everybody.

2 MURPHY: Well, you could. I mean you could make a  
3 decision behind closed doors. You could pull the curtains and  
4 turn off the lights and arrive at the correct scientific  
5 decision.

6 CAMERON: Okay. So, there's the transparency,  
7 etcetera, etcetera.

8 MURPHY: Mike put his finger on it. If you get the  
9 fair and -- you know, the words "opportunity," the words  
10 "fairness," etcetera, all connote at least having a process  
11 which does not inhibit the public arriving at some confidence  
12 that that particular decision is correct based on some science  
13 or however you want to phrase it.

14 CAMERON: Jill, you wouldn't disagree with that  
15 statement, would you, that Mal just made?

16 Tony, one last comment and let's go to the next part  
17 of this.

18 ROISMAN: I was just going to talk about the public  
19 perception question, because I think it does fit into an  
20 important difference and a point that Tony was making about  
21 different kind of proceedings and we look at them different  
22 kinds of ways.

23 I was at the Natural Resources Defense Counsel when  
24 they split with the intervenor, Nuclear Community, and I still  
25 believe in the position that we took, which was that, when it

1 came to high-level nuclear waste disposal, that issue was too  
2 important to allow it to be some political -- the people who  
3 didn't want to see more nuclear power plants believed that, if  
4 we pushed on that issue, making it as political as possible, it  
5 would become a clog in the nuclear reactor pipe, and as a  
6 result, nuclear reactors would have to be shut down because  
7 there was no waste disposal solution, and the position that  
8 NRDC took on that, Tom Cochran and I, when I was there in the  
9 organization, was that, on the issue of nuclear waste disposal,  
10 we already had it.

11 Even if we didn't have a single operating nuclear  
12 reactor in the country, we had all the high-level waste from  
13 the military operations and the waste disposal problems were  
14 essentially identical in terms of finding the repository, that  
15 if we allowed it to get politicized -- in other words, if the  
16 nuclear waste disposal act included essentially a gubernatorial  
17 veto, then we would end up with the politically safest place to  
18 dispose of these unavoidable wastes rather than the  
19 technologically safest place to dispose of these wastes.

20 Well, as you know, we lost that battle, and we now  
21 have this mess in which the public perception of the dangers of  
22 nuclear waste disposal may be scaring the nuclear waste  
23 disposal away from the safest site.

24 I don't know if that's true, but I know that the  
25 government, to some extent, didn't try to investigate sites in

1 places where they knew that it was a political dead on arrival.

2           So, they ended up at places which they thought it had  
3 political viability, like land already owned by the government  
4 in some way or land owned by Indians who the government still  
5 thinks they own, but something like that, and so, there are  
6 public perception issues that actually end up going to the  
7 merits.

8           I don't think they go to the merits on nuclear power  
9 plants, as such, but I think they really do go to the merits on  
10 some of these other issues.

11           So, while I agree with Jill's point, the idea here is  
12 not to create a Madison Avenue ad campaign, get ourselves a  
13 logo and something like Ready Kilowatt or something and sell  
14 it, I think that, until the public has confidence in the  
15 process, they can't have confidence in the decision.

16           Except with the exception of George, who tells me he  
17 went to engineering school, probably most of us here at the  
18 table don't have the ability to make a nuclear engineering  
19 safety decision on our own. We're also trust it to somebody  
20 else.

21           So, everybody's going to end up trusting it to  
22 somebody else. The question is, is the process such that  
23 you're willing to do that or are you unwilling to do that? But  
24 Mal's point is right -- or Mike's point -- which is that, if we  
25 go through all those other things, what comes out at the other

1 end is all those objectives, dispute resolution, and public  
2 acceptance, but if it didn't produce public acceptance at the  
3 end, that would be, for me, a red flag that we'd done something  
4 wrong, we didn't get fair right or we didn't get opportunity  
5 right or we didn't get sound right or we didn't get correct  
6 right in terms of all the details that we attach to the  
7 platitude that whatever that statement ends up being, it will  
8 be, until we put the meat on it.

9 CAMERON: Okay. Thanks, Tony, for that. That was a  
10 good closing remark on this particular segment.

11 What I'd like to suggest that we do -- and I'll ask  
12 if anybody has a comment in the audience in a minute on what we  
13 just discussed -- is I would like to go around to all of you --  
14 I don't want to have you give me every concern or problem that  
15 you see with the current hearing process now.

16 We'll get those down, and if you could give me an  
17 underlying cause, sort of get these down before we go and  
18 evaluate them and, at some point, take a look at what are the  
19 fixes?

20 Do people agree, and what are the fixes to these  
21 problems, and I think that these fixes are going to take us  
22 back into all of the phrases and terms in the objective that  
23 we've just been talking about, actually.

24 Does anybody in the audience have anything on the  
25 objective of the hearing process discussion?

1           Yes, Steve. Just identify yourself and affiliation  
2       for the record, please.

3           CROCKETT: I'm Steve Crockett. I am in Commissioner  
4       McGaffigan's office.

5           I would like to make essentially two points, one by  
6       way of clearing some ground so that we don't shortchange this  
7       discussion too much, and I want to reply to Jim Riccio.

8           The issue of whether there should be hearings and  
9       what the process should be, the issue of whether regulations  
10      should be risk-informed or not, any of those issues which have  
11      come so much to the front and center since our near-death  
12      experience with the Congress last year have been issues which  
13      have been there for a long time.

14          They are being raised by persons and organizations  
15      that will keep raising them long after the current composition  
16      of the Congress changes.

17          I have been working on these issues for years while  
18      our committee oversight groups have changed. They will not go  
19      away. We have to deal with them. We have to face them. The  
20      questions are permanent.

21          I give you as one example Justice Breyer's 1993 book  
22      on "Breaking the Vicious Circle." That raises issues about  
23      risk-informed regulation not just of nuclear power but across  
24      the government, every health and safety agency has to look into  
25      those.

1           So, I think you have to keep pressing the discussion  
2       that you're having.

3           Second, any of the aims of the hearing process that  
4       any of you, NRC or other people, have raised here today are all  
5       aims that can be met through processes other than hearings. I  
6       am not yet hearing from you anything which only hearings can  
7       do.

8           The public can be educated and should be educated  
9       through the availability of massive amounts of information,  
10      accessible to everybody in a short period of time. That  
11      doesn't take a hearing.

12          Disputes can be resolved through devices other than  
13      hearings. The public can be given a fair chance to participate  
14      through devices other than hearings.

15          Commissioner McGaffigan has argued that, in fact,  
16      people other than parties immediately interested in a  
17      particular licensing proceeding should have an opportunity to  
18      participate in licensing decisions.

19          A sound record which can serve as the basis for a  
20      decision has to be compiled in any case, whether there is a  
21      hearing or not.

22          I have not yet heard a reason why a hearing has to be  
23      held rather than some other kind of device. I think that's a  
24      question that you have to at least keep in the back of your  
25      minds, especially considering that the NRC is the only agency

1 that has such a statutory requirement laid upon it.

2 Now, maybe Mr. Roisman is right, that it has such a  
3 requirement laid upon it because this is the only technology in  
4 which zero tolerance has to be the policy, but I'm not sure  
5 that's true.

6 ROISMAN: Which is not true? Zero tolerance?

7 CROCKETT: I'm not sure that nuclear power is the  
8 only advanced technology in which zero tolerance could be  
9 argued to be an advisable goal.

10 CAMERON: Okay. Thank you, Steve, for the first  
11 point in terms of the need to keep discussing and debating  
12 these issues, and also, we have been and, I think, will be  
13 addressing the second point that you raised.

14 Steve, do you want to respond?

15 KOHN: I wanted to respond on the not yet heard why a  
16 hearing must be held. I can wait and we get into at a later  
17 point, but he did pose that question. It might be time to take  
18 a break, but I'm more than willing to give my view on that.

19 CAMERON: I think we're going to get into that, and  
20 let me talk to you about that at the break, and we'll see where  
21 to put that in, and Steve, hopefully, you're going to be able  
22 to be with us?

23 CROCKETT: Having my remark reflected back by you  
24 right now makes me realize that I'm probably putting an  
25 emphasis in the wrong place.

1           I don't want to raise here a question which would  
2   invite your consideration whether the Atomic Energy Act should  
3   be rewritten so that 189(a) is no longer in it. I'm not posing  
4   that question.

5           Rather, I'm asking you, since 189(a) is there and we  
6   have to decide what the best thing to do under it is, that when  
7   you ask yourself what are the aims of the hearing process, you  
8   try not to be -- you may ultimately have to be satisfied with  
9   the kind of answer that I hear from you but don't like, but  
10   look to see whether there is something that can be done  
11   uniquely with it.

12           Is there some purpose which is served only by a  
13   hearing under 189(a)?

14           Now, let me put the question in a slightly different  
15   way.

16           You are here considering the form of a hearing under  
17   189(a). I ask you to consider a different aspect of the form.

18           189(a) is the one door through which the licensing  
19   decision ceases to be the licensing decision of the staff.  
20   Looked at from that point of view, it's very odd. It's doubly  
21   odd, because it puts the Commission in the ultimate decision  
22   point.

23           It takes a politically appointed body which answers  
24   as much to Congress as it does to the President, but the  
25   initial route to the Commission's decision is through an



1 independent judge, like Judge Bollwerk, but at that point, it  
2 ceases to be in the hands of the staff.

3 Now, what decision is it, what important technical  
4 get-it-right decision is it that has to be made by taking it  
5 out of the hands of the long-term, steady-state civil service  
6 and getting it into the hands of the shorter-termed  
7 politically-appointed body called the Commission?

8 It's very odd, but there may be real opportunities  
9 there, and so, I would ask you, when you think about the form  
10 of the hearing, think about what kinds of decisions are best  
11 made by such an unusual structure.

12 CAMERON: Okay. Thank you.

13 KOHN: I just want to use the example of the Vogtle  
14 proceeding in which there was a major technical issue, and if  
15 you sat in that proceeding, which I think the industry has  
16 criticized, but what you saw -- there was a whistle-blower,  
17 whom I generally represent, a technical expert thrown out of  
18 the industry, someone with impeccable credentials, and when  
19 this man assisted in the cross-examination of the NRC witnesses  
20 and the utility witnesses and you did that process known as the  
21 adversarial system, it really demonstrated real scientific  
22 deficiencies in the safety of that plant, enough to have the  
23 board essentially say we're going to go look into sua sponte,  
24 major root cause issues here, because what you have, what major  
25 didn't exist 20 or 25 years ago, in a lot of other earlier

1     licensing proceedings, you have a lot of whistle-blowers,  
2     people with tremendous technical expertise, who can add to a  
3     safety proceeding in a manner which only the adversarial system  
4     will allow, because when you put the engineer up on the stand  
5     who says this is safe and we have someone to cross-examine that  
6     person and we have a neutral judge and a transcript and  
7     judicial review, maybe we'll get to the truth, but once you  
8     pull that out, the same whistle-blowers who have been tossed  
9     out of industry, illegally, many of them -- their input will be  
10    gone, and I want to go back to plant Vogtle, because I  
11    represent two clients down there. One settled.

12           I have another client, Marvin Hobbie. This  
13    Commission issued a level one violation, the highest possible  
14    violation in the regulatory hierarchy, about this man's illegal  
15    discharge, and that was 1995, and the utility has, I think,  
16    improperly been fighting and fighting and fighting, and we've  
17    been raising these concerns.

18           It's now 1999. He's been out of work for nine years,  
19    and the Commission hasn't lifted a finger to get this man back  
20    to work, to address his concerns, nothing.

21           The only place Mr. Hobbie will have an opportunity  
22    again is if Southern Company wants to relicense Hatch and he  
23    can come in and testify, but when you're talking about delays,  
24    I have a man who went from \$120,000-a-year job in which Admiral  
25    Wilkinson, the former head of INPO, took the stand and said he

1 was a great man and a great asset to the nuclear industry --  
2 he's been out of work nine years, and you're talking about  
3 delayed proceedings?

4 CROCKETT: I'm not talking about delayed proceedings.

5 KOHN: Mr. Hobbie still is out of the industry.

6 CAMERON: Steve, I think, if you're able to stick  
7 with us for today and tomorrow morning, I think you'll get some  
8 more partial answers to this.

9 What I'd like to do now, at least start on, is get  
10 some opinions, perspectives from all of you on what is broken,  
11 and why is it broken, and I was going to start with Diane and  
12 Jill on this end of the table and then go over to Tony to get  
13 your perspectives.

14 CURRAN: I've got a long list, but I guess I'll start  
15 with my favorites.

16 We're talking about sub-part G here? Could be  
17 anything, huh?

18 CAMERON: Larry, I just want to check. Right? Could  
19 be anything, right?

20 CHANDLER: Well, I would think so.

21 CAMERON: Okay.

22 CHANDLER: I think the overall objective, the mission  
23 we're on, is to look at all of the hearing processes that the  
24 Commission has on the books right now.

25 CAMERON: Thanks, Larry.

1 CURRAN: I think we said before that, when you  
2 compare G and, say, L, which is the most formal with the least  
3 formal, with G, the advantage is you get discovery and cross-  
4 examination, the disadvantage is it's very difficult to get in  
5 in the first place.

6 With the informal proceeding, it's easier to get in,  
7 but once you get in, the amount of information that you have  
8 access to is restricted to what the staff puts in the public  
9 document room, there's no discovery, there's no cross-  
10 examination, and I think Tony was referring to the very large  
11 amount of paper that sometimes gets filed in these things,  
12 partly because you don't have a chance to winnow and hone  
13 things down, you've basically got to take a shot at this  
14 enormous record that you've got and address the evidence that's  
15 in there, but to get back to sub-part G, which is, I think, a  
16 major concern here because of reactor relicensing, the raised  
17 standard for admissibility of contentions has really had, I  
18 think, a chilling effect on intervenor ability to participate  
19 in NRC licensing cases, because as Bob was saying, you  
20 essentially have to prove your case right at the get-go, when  
21 the application is filed. It's a very, very high standard.

22 It's daunting. It forces one to make a lot of  
23 choices right at the beginning. You can do the best job you  
24 think you can possibly do, bringing to bear all of the evidence  
25 that you can think of, and still not get issues in, and it

1 raises -- there is definitely a public perception that this is  
2 -- the bar has been raised to the point where the public is not  
3 really invited.

4           You know, if you're clever enough to somehow scale  
5 this hurdle on at least a couple issues, you are one successful  
6 person, but you know, that's not the way it should be.

7           Another major problem that goes along with that is  
8 that generally when the application is filed, it's not  
9 complete, and I have found many times, if your complaint is  
10 there isn't enough information here on which to conclude that  
11 the regulation is satisfied, it's thrown back at you, you don't  
12 have any evidence to support your contention, you're out.

13           So, again, the perception and the reality is that  
14 it's very difficult. The target is moving all the time, but  
15 the intervenor is standing still.

16           Then, once you get an issue into a sub-part G  
17 proceeding, there's a constant obligation to revise your  
18 contention or else risk having it thrown out in summary  
19 judgement, and if you do revise the contention, it's the  
20 intervenor -- although, you know, it's not the intervenor's  
21 problem that the application is constantly being revised and  
22 wasn't complete at the outset, but it becomes the intervenor's  
23 burden of satisfying a significant good cause standard of  
24 keeping the contention alive as the application changes.

25           Again, the target keeps moving, but the intervenor is

1 held still.

2 CAMERON: Before we see if Jill has anything, I just  
3 want to make sure that I got this. It's difficult to get into  
4 sub-part G proceedings, and the public perception is that the  
5 process is designed to keep the public out, they're not invited  
6 into the proceeding, there's not a fair opportunity to go back  
7 to our objectives that we talked about.

8 The cause of too difficult to get in is the  
9 contention standard is too high, you almost have to prove your  
10 case right at the beginning, and it's made more difficult to  
11 get an acceptable contention in because there's a lack of  
12 available information that you might need that you don't have  
13 access to to do that?

14 CURRAN: Right.

15 CAMERON: Okay. Good. All right.

16 Larry, do you have a problem with the current hearing  
17 process? I don't want to get comments on this, but if you want  
18 to ask a clarifying question, go ahead.

19 CHANDLER: That's exactly what I'd like to do.

20 The standard we're talking about, of course, is the  
21 one that's been in place for 10 years. It hasn't been changed  
22 more recently, as I recall.

23 CURRAN: It's recent in my life.

24 CAMERON: Okay. Thank you.

25 CHANDLER: The clarification I would like to get is

1 with respect to the last point that you made, Diane, in terms  
2 of lack of availability of information makes it difficult.

3 I understood earlier, the comments you made with  
4 respect to changes in information, caused by an applicant's  
5 periodic updating or revision of an application, how that could  
6 bear on the contentions that have been previously admitted, but  
7 I don't quite understand it in terms of the sufficiency of  
8 available information at the outset.

9 In other words, an application has been tendered by  
10 an applicant, it's publicly available, and where is the -- what  
11 is the unavailability of information in terms of then casting a  
12 sufficient contention?

13 CURRAN: Well, for instance, if you come in and say  
14 the applicant makes X and such an assertion but hasn't done the  
15 calculation to support it and my expert says I can't verify  
16 whether what the application is saying is correct, because I  
17 haven't had access to that calculation, whether it's because  
18 the calculation wasn't submitted or whether it hasn't been done  
19 yet, but then the agency's response is, well, you haven't --  
20 you, the intervenor, haven't done an analysis, you haven't  
21 given me evidence why whatever this assertion isn't supported,  
22 and then it's sort of a circular kind of thing.

23 CHANDLER: It's almost more the first issue, I think,  
24 that you're raising, that the standard is too high, that you  
25 essentially have to prove your case at the time you try and

1 submit your contention.

2 It's not just simply showing a deficiency in the  
3 application but establishing as a matter of fact that the  
4 application is incorrect or inaccurate with respect to a  
5 particular point.

6 CURRAN: Yeah, that's probably fair.

7 CAMERON: Okay. Let's see if Jill has anything.

8 Do you want to add anything about problems that you  
9 see?

10 ZAMEK: I do.

11 CAMERON: Go ahead.

12 ZAMEK: One of them is the generic issue, where the  
13 public does not have the opportunity to address certain issues,  
14 and there are a lot of them. The waste issue is one of them.

15 CAMERON: In other words, issues taken off the table  
16 through rule-making are rather generic types of things.

17 I guess that the issue is not -- I guess that the  
18 concern would be that not all the issues are up for discussion  
19 and the -- I guess the underlying cause of that is that the  
20 issues have been taken off the table by generic mechanisms.

21 CHANDLER: Rule-making.

22 CAMERON: This is the NRC, right?

23 CURRAN: Making a generic environmental impact  
24 statement, which is often reflected in the rule-making, but all  
25 the reasoning is in the EIS.



1           RICCIO: Chip, if I could just give Larry an example,  
2 look at Calvert Cliffs. Almost as much has been filed since  
3 these guys intervened than was originally on the docket.

4           There's no way you can present, you know, basically a  
5 prima facie case when you only have half a license application  
6 there or the relicensing application there.

7           SILBERG: But in the 1970s, it was the intervenors  
8 who wanted the notice of opportunity to be filed early so  
9 people could get in at the beginning and not wait till the  
10 staff review was complete.

11          ROISMAN: No, that's not right. They don't get in at  
12 all until the notice is filed when all that work's been done.

13          The problem -- and it was number one on my list --  
14 was you must let the public sit in on the staff vendor and then  
15 staff utility process, then assuming that we've dealt with this  
16 funding issue -- then you can legitimately say to them, okay,  
17 you've been part of the process from day one, we're now at the  
18 end of the process, you've identified the things you don't  
19 agree with, presumably the utility has identified the things it  
20 doesn't agree with, the vendor has identified the things that  
21 they don't agree with, does anybody want to fight about it in a  
22 hearing and we'll go to a hearing board and we'll resolve it.

23          Then you can fairly say to someone I want to know  
24 exactly what you object to.

25          You don't have to worry about having seen the

1 calculation, because you'll be there at the meeting when the  
2 guys says, hey, I did my calculation and it showed this was all  
3 right, and then you'll raise your hand and you'll say, sir,  
4 we'd like to see calculation.

5 Even if the staff doesn't ask for it, you'll ask for  
6 it.

7 But what's happened is the industry and the staff  
8 spend maybe years working together to come to a conclusion, and  
9 then they burst it out on the public and say, okay, guys, let's  
10 hear from you right away, what don't you like about this?

11 Let us in from day one. Don't hide it. Really have  
12 openness, or as this I think somewhat inappropriately refers to  
13 as transparency.

14 No internal memos, all the center's views fully laid  
15 out on the record and available to anybody to look at, from  
16 your vendors, from your utilities, from your consultants, from  
17 your staff. Get it all out.

18 SILBERG: Name one organization in the world that  
19 operates that way?

20 ROISMAN: Why shouldn't it?

21 SILBERG: Because it doesn't make sense.

22 ROISMAN: Of course it makes sense. It makes sense  
23 if you want to have a process which at the end -- you want at  
24 the end, when all of this stuff has gone back and forth, you  
25 want at the end quick decision. Okay. I think a quick

1 decision is possible if everybody started at the same time.

2 But what you want to do is you want to run a 26-mile  
3 marathon, and at the 25th mile, you yell back to the starting  
4 gate and say, okay, intervenor, get started. That, I think, is  
5 really central.

6 CAMERON: This sounds like we're getting into perhaps  
7 a potential option to fix this, and I know that we have some  
8 other things to say.

9 ROISMAN: You were asking for problems, and that's a  
10 problem.

11 CAMERON: Okay.

12 ROISMAN: A problem is that the public doesn't get to  
13 participate meaningfully in the process until the process is  
14 essentially over, and if I were on the other side, I'd be  
15 complaining, too.

16 I spent three years getting the license through the  
17 staff, who beat the heck out of me all the way along, and now  
18 that I'm done, I've got some intervenor who comes along, a term  
19 that is itself pejorative, an intervenor who comes along, a  
20 Johnny come lately, and he says I want to go through the whole  
21 thing again, and I can see why that would be frustrating to the  
22 industry, but see it from the standpoint of the citizen.

23 It's frustrating to them to not have been there at  
24 the inception. In fact, if they were, I think they would  
25 understand where the choices were made and be more comfortable

1 with the choices that they understood from day one.

2           So, the first thing would be an openness issue, part  
3 of the staff deliberations and all the other deliberations. I  
4 mean what is it about an internal memorandum that makes it  
5 somehow or another -- this isn't like, you know, showing  
6 private parts.

7           This is real stuff somebody wrote in a memo that  
8 something was wrong.

9           SILBERG: We don't get to see them either.

10          ROISMAN: You should see them. Why shouldn't you?  
11 I'll support you on that. All the ones that I've been in that  
12 did run that way ran better for it.

13          CAMERON: Okay. We're going to come back and debate  
14 these, and that's why I don't want to even like get into some  
15 of this clarification business, because we'll never get through  
16 this. So, what I want to do is identify some problems.

17          ROISMAN: The next one, I think there's an  
18 objectivity problem, and I'm glad that a representative of the  
19 Commissioners is here.

20                I think that we need to take the Commissioners out of  
21 the process.

22                The Commission should set policy, and it should  
23 review decisions of licensing boards on policy concerns, but it  
24 should not be the ultimate decider, and I think that the  
25 gentleman from the -- is it Steve? I think Steve made the

1 point that the Commission is getting involved in looking at  
2 stuff that the staff has already done, and I think there is a  
3 problem with that.

4 I think that the staff is the arm of the Commission,  
5 and they should be. They should reach their decisions. These  
6 issues should to a licensing board, and I would favor the  
7 reinstitution of the Appeal Board, and once that's over, the  
8 Commission review should be limited to policy questions only.

9 CAMERON: Tony, can I just ask you, is that because  
10 of the potential political aspects or not being able to come up  
11 to speed to make the decision?

12 ROISMAN: I think it's much more the second. I mean  
13 the Commission is less qualified than the licensing board to  
14 make the substantive decision, and because of the appropriate  
15 limitations of the ex parte rule, they can't really rely on the  
16 staff to help them make the decision.

17 So, you have a board that sits for a year or two or  
18 whatever it is, two technical members, a lawyer, they go  
19 through this whole thing, and they say, based upon everything  
20 that we looked at, we decided the right answer is this, and  
21 then you let an appeal board, also made up of technical member  
22 and legal members, review that, and they say we either endorse  
23 it or we endorse this much of it, reverse that much of it,  
24 whatever, and then we send it to a group of commissioners who  
25 probably don't have the time, certainly don't have the staff,

1 because the real staff is now a party -- the real substantive  
2 staff is now a party -- to really get into the substance.

3 They should be concerned with the policy. If someone  
4 is making a brand new policy decision, of course they should  
5 make that. Then go straight to the courts with it.

6 All right. That's the second.

7 Third thing: We talked about the fairness and  
8 opportunity question. So, I'm going to put funding of citizen  
9 participants on that, and I don't put that on there because the  
10 citizens need the money.

11 I put that on there because I think both the  
12 regulatory staff and the utility need the benefit of that  
13 objective, independent challenge to what they are doing, and  
14 so, I think there's a real benefit.

15 I reinforce the point that was made by Jill. The  
16 turning of issues that belong at the licensing process into  
17 generic issues just about the time it looks like they're going  
18 to get important in licensing issues does seem as I think one  
19 Court of Appeals referred to as disingenuous.

20 I think that it -- there needs to be some limit to  
21 the use of that authority.

22 CAMERON: We'll get to that.

23 ROISMAN: Recognizing that that authority is there.

24 I think all of those things go to what I believe is  
25 what the Commission, the utilities want. They want a process

1       which, one, gives them certainty, gets completed in a  
2       reasonable period of time, and they can go on.

3               I think that Jay speaks what I believe is the  
4       utility's view, and that is the idea that they can tolerate a  
5       no.

6               What they can't tolerate is seven years of not  
7       knowing yes or no, and I'm sympathetic to that, but that  
8       process -- if you want to get everybody started at the same  
9       time on the marathon, you have to start them on the same day,  
10      at the same moment in time.

11              CAMERON:   Okay.   Thank you.

12              Let's see if we can get everybody out here on what  
13      their particular problem is.

14              Tony, I was going to go to you next, and then we're  
15      going to come back and we'll have a discussion of all this.

16              THOMPSON:   Once again, I'm not speaking of reactors.  
17      I'm speaking of the materials licensees and the sub-part L-type  
18      paper proceeding.

19              We have a lot of problems.   For example, we didn't  
20      have a whole lot of hearings on uranium recovery issues for  
21      many, many years.   All of the sudden, in the last three or four  
22      years, two-and-a-half, three years, we've had 20 of them.

23              As a result, neither the NRC legal staff or the  
24      presiding officers had much experience with the portions of the  
25      Atomic Energy Act that apply to these facilities, and so, when

1 we get into a process where it's only on paper and the people  
2 coming in from the outside, the intervenors or the interested  
3 parties, don't understand the process much better, we wind up  
4 having a very protracted kind of situation, and one of the  
5 things that needs to be done, it seems to me, is that the  
6 presiding officer has got to control the paper proceeding.

7 The rules, for example, do not -- if the rules  
8 mandate you have an opportunity to reply, obviously you have  
9 the opportunity to reply.

10 If they don't mandate an opportunity to reply, then  
11 you shouldn't be able to request an opportunity to reply and  
12 then petition for rehearing on the request that was denied and  
13 petition for interlocutory review, because that is not leading  
14 towards a fair and efficient decision-making process.

15 I would say that, with respect to generic  
16 proceedings, I mean if you have rules -- for example, the GEIS  
17 for uranium mill tailings says this deals with the generic  
18 issues related to this particular part of the fuel cycle, but  
19 every individual license site is going to have to justify based  
20 on either an ER, EA, in some cases an EIS, depending upon what  
21 the activity is involved, and those rules have been in place  
22 for 15 years, and to come into a proceeding and start arguing  
23 about the NRC regulatory program is a waste of time.

24 The presiding officer should say, you know, you've  
25 got to challenge those things within 60 days or you're out, you



1 know, and you can't come in and complain about the Appendix A  
2 regulations 15 years after they've been on the books.

3 So, there has to be, I think, some sort of controls  
4 on the informal hearing process, and the presiding officer, I  
5 think, bears the burden.

6 The bar is lower, as Diane said, for standing, and  
7 frankly, in some cases, what we have is people that come in,  
8 and the judge will give them three and four chances to revise  
9 their filing in order to satisfy standing requirements, and by  
10 the time all that's done, the licensee's spent 15,000 bucks  
11 pointing out the fact that, you know, it isn't any different  
12 than it was before.

13 I mean there has to be some limit on how many times  
14 you get to go to the well. If we're supposed to live by the  
15 rules, recognizing that a pro se person is going to get a  
16 little bit of an extra break -- they don't need to get three  
17 and four bites, and that's what we've been experiencing.

18 And I think the other thing to remember, at least as  
19 far as I'm concerned, is that the NRC is, by definition `nd by  
20 statute, as an independent regulatory agency, a reactive body.

21 The licensee has the prime responsibility to propose  
22 either a license amendment or a license application. The NRC  
23 is limited to accepting it, rejecting it, or accepting it with  
24 conditions, essentially.

25 And so, by definition, if we're not going to have

1 just sort of an arbitrary end to a license application, it's an  
2 iterative process.

3 I don't know why, for example, if a uranium recovery  
4 licensee applies for a license amendment for a reclamation plan  
5 and it's noticed in the Federal Register, why people can't get  
6 in and get involved in the information and the discussions  
7 right from the beginning.

8 It may be different in the reactor side, but it's  
9 certainly not -- NRC has to notice every meeting with a  
10 licensee that involves a discussion of a regulatory issue, and  
11 we frequently have people who are adverse to our interest, such  
12 as, for example, Enviro-Care, who I wouldn't exactly call a  
13 public interest group, sitting involved with us and the  
14 Commission staff as we're discussing what are the regulatory  
15 requirements or what are the things the staff wants to see or  
16 what information do they need for this or that or the other.

17 And frankly, in an informal hearing process, I  
18 wouldn't object to oral proceedings if there were a means to  
19 control things.

20 We had, in the old days, in the MSHA area, we used to  
21 have -- the statements were provided -- not even provided in  
22 advance, but if you could provide witness statements in  
23 advance, if you could try to get together and agree on  
24 stipulating to facts, people can read their statement into the  
25 record, they can be cross-examined, and then you can go on.

1           I don't object to oral parts of informal hearings,  
2       but what I really think is important is that the judges and the  
3       presiding officers need to develop some guidelines, and it's  
4       only fair if everybody understands what those guidelines are,  
5       that Diane and I both understand what is expected of us, and if  
6       that's the case and either one of us doesn't measure up, then  
7       we have to take that. That's our problem.

8           CAMERON: Okay. Thanks, Tony, and as I just told  
9       Ellen, we are going to come back and discuss each of these,  
10      okay? I'm trying to see if we can exhaust -- sort of get a  
11      litany of potential problems up there to discuss it at one  
12      time.

13          THOMPSON: I just wanted to add one more thing, and  
14      that is that I think that, particularly with an informal  
15      hearing process, you set out the outlines of the process, but  
16      depending upon what the issues, the technical or health and  
17      safety issues that are the focus of the inquiry are, then I  
18      think risk-informed control of the proceeding by the presiding  
19      officer is important.

20          In other words, the presiding officer in a hearing  
21      that involves some minor thing that somebody doesn't understand  
22      and it isn't really a big deal anyway doesn't need to have all  
23      of the trappings of something that, for example, a uranium  
24      conversion facility, where a release of certain uranium gases  
25      could pose a threat both to workers and public health and

1 safety, significant threat.

2           So, I think there needs to be some risk-informed  
3 approach of the presiding officers, and the Commission needs to  
4 give them guidance, that we don't necessarily require the same  
5 level of assurance for something, in Tony's words -- just  
6 changing it around slightly -- low-probability and low-risk.

7           There's a difference between low-probability and low-  
8 risk and low-probability and high-risk of adverse impact.

9           CAMERON: Okay. I guess we probably have to be a  
10 little bit more concise in putting these problems up, because  
11 there's a lot of good commentary associated with it that is  
12 getting everybody's juices going about responding, and we'll  
13 probably never work out way out of this if we do that.

14           We're getting ready to take a break, and I know that  
15 Diane -- I want to give Diane and Larry a chance to respond to  
16 Tony, but Mike McGarry, do you have some examples of, you know,  
17 concerns, problems with the existing hearing process?

18           MCGARRY: Observations rather than concerns, and this  
19 is more meat and potatoes. I think Tony Roisman took us to a  
20 nice plane. It was at a higher level. This is a little lower  
21 level.

22           One is efficient discovery. I think we all would  
23 agree, too many fights, too many motions. I would subscribe to  
24 the implementation of Rule 26 making documents available and  
25 let's get on with it.

1           Efficient conduct of the hearing. I'm not  
2 necessarily in favor or disfavor of a rocket docket. I'm not  
3 suggesting that when I say efficient conduct of a hearing, but  
4 reasonable case management.

5           Third, efficient decision-making. I've been  
6 scratching my head thinking about how many cases I've been  
7 involved in and how many cases where I just think it took too  
8 long for a decision to be rendered, and we understand that the  
9 boards are busy, at least in the past they were. Now they're  
10 probably just as busy, because there are fewer board members.

11           I don't need to get into particulars, but there are  
12 more more than one or two examples where any reasonable person  
13 would say that just took too long.

14           Fourth, role the staff. From my perspective,  
15 representing utility clients, you can't get to it until you've  
16 got an SER or an EIS, and yet, you've started the process and  
17 we're into discovery.

18           I wonder if the process can earlier focus on the five  
19 or six contentions that are at issue and develop positions on  
20 those matters as we all go forward.

21           Fifth and last, novel questions. Questions come up  
22 in hearings -- Diane and I had several. One was the role of  
23 competition in an NRC license. Another one was the scope of  
24 attention and review of the issue of -- important issue of  
25 environmental justice.

1           We all have issues from time to time that arise that  
2       they don't necessarily lend themselves to a decision by the  
3       board and then maybe you go up for an interlocutory appeal, but  
4       clearly we all recognize they're going to be big items and  
5       perhaps some vehicle to get novel questions to the Commission  
6       so we can establish the Commission, so we know what we all have  
7       to deal with.

8           CAMERON: Thank you, Mike.

9           Susan?

10          HIATT: I just wanted to ask Mike real quick, when  
11       you talk about competition, are you talking about whether an  
12       economic competitor should have standing?

13          MCGARRY: Yeah, that issue.

14          CAMERON: Susan, do you want to raise anything that  
15       you haven't heard so far?

16          HIATT: I'd like to tough again on the issue of  
17       delay. I said earlier that, in my view, delay can be a  
18       legitimate strategy, but that's the case, really, when that's  
19       the only thing left to us, when we can't win fair and square,  
20       because either there's a biased agency or because the vast  
21       disparity of resources will virtually assure a one-sided  
22       record.

23                So, I think, from our perspective, if delay is a  
24       problem, it's because of primarily a resource issue and the  
25       idea that it isn't fair either on a resource basis or the fact

1 that -- I know I've had cases where I brought an issue before  
2 the Appeal Board, a seismic issue, the Appeal Board was going  
3 to hold an exploratory mini-hearing, the Commission sua sponte  
4 shot it down, and I think what happened in the resultant  
5 judicial review is it caused more delays there for the licensee  
6 than if the Appeal Board had been allowed to go ahead.

7 It's a perception of maybe the system isn't  
8 necessarily always fair to us, so delay is the best thing we  
9 can get.

10 SILBERG: Remember, in that case, we were not opposed  
11 to the Appeal Board hearing.

12 HIATT: I know you weren't. You weren't the problem.

13 CAMERON: For once. Okay.

14 We're going to take a break in two minutes, and we'll  
15 come back to all this, but I wanted to give Diane and Larry a  
16 chance to say something before we break.

17 CURRAN: I guess the main point I wanted to make was  
18 the issue of control by the presiding officer has come up  
19 today.

20 Tony raised it, and we're both talking about -- I  
21 think we both have recent experience in mind on the same case  
22 in which it was the intervenor's perception that the applicant  
23 got quite a few trips to the well and so did the NRC staff,  
24 that if the record was considered incomplete for purposes of  
25 rendering a decision on behalf of the applicant, the presiding

1 officer asked a number of questions, invited the applicant or  
2 the staff to amend the record, and then of course, based on  
3 this additional evidence, ruled for the applicant, and at  
4 various times when the intervenors tried to do something  
5 similar, it was ruled that we had not provided enough evidence  
6 to support our position.

7 So, there's certainly a perception that control, or  
8 lack thereof -- it can be seen two different ways.

9 Tony, for the second time today, you were talking  
10 about using risk to inform the level of procedural protections  
11 that are provided to the public, and I just want to point out  
12 that, often, the most hotly debated issue in the case is what  
13 is the level of risk to the public posed by this particular  
14 project, and you know, it was our very strong position that the  
15 particular project that we were both litigating was more  
16 dangerous than the applicant thought, so that I would just ask  
17 the agency to venture very, very carefully in that particular  
18 direction, because it's very much based on the perception of  
19 the viewer.

20 CAMERON: The issue of risk may be the central point  
21 in the proceeding, actually. All right.

22 Larry, we'll give you the last word, and then we'll  
23 take a break.

24 CHANDLER: Just a couple of quick observations, if I  
25 could.



1           Jill and Tony had alluded to difficulties and  
2 concerns related to the inability to get into certain matters  
3 because they've been generically resolved, and I would just  
4 point out and I'm sure Tony appreciates that there is the  
5 opportunity to challenge the application of specific  
6 regulations in specific cases.

7           It's an extremely high threshold. I don't know that  
8 it's one that's ever been used successfully, candidly, but it's  
9 an opportunity that is there. Rules can be challenged.

10          Then Tony and Tony made observations about  
11 participation with the staff, participation at meetings between  
12 the staff and license applicants, and just for perspective, I  
13 think Tony Thompson is right.

14          There are opportunities provided to members of the  
15 public to attend meetings between the staff and applicants. At  
16 the same time, in fairness, those meetings typically are open  
17 for observation and not for full participation.

18          So, clearly, members of the public have an  
19 opportunity to be there, to observe. I wouldn't say they're  
20 never afforded an opportunity to ask questions, but it  
21 certainly is not a full participatory opportunity, in fairness,  
22 to members of the public who might want to be there.

23          The other thing that that raises, however, is a  
24 question of notice and when notice of an opportunity for a  
25 hearing is provided, and I guess Jim was only in maybe high

1 school at the time, but Tony and I remember, and maybe some  
2 others, when the Commission's regulations were different.

3 In fact, notice of opportunity was not given until  
4 the staff reviews had been completed.

5 In fact, the criticism Tony leveled perhaps was  
6 justified at that time because it was well recognized that the  
7 staff would have gone through discussions with license  
8 applicants prior to a time in which public involvement was  
9 afforded.

10 Those regulations were changed -- it was either '72  
11 or '74 when the rules were restructured -- to provide for early  
12 notice, notices provided very shortly after an application is  
13 received.

14 So, meetings then between the staff and applicants  
15 are publicly noticed.

16 The public has an obligation to come in early in the  
17 process, but they also have an opportunity early in the process  
18 to observe and take from meetings with the applicants concerns  
19 that the staff may have, as well as an opportunity early on to  
20 see the application and supporting documentation.

21 CAMERON: Okay. Thanks, Larry. We are going to come  
22 back to discuss these issues.

23 Ellen?

24 GINSBERG: Thanks.

25 At the risk of a little bit of repetition, I think

1       it's really important to articulate one of the industry's views  
2       on an issue that's been bandied about here somewhat indirectly,  
3       and that is the issue of this resolution of issues generically.

4               I think the industry thinks that there is a -- the  
5       agency has long done this, there's efficiency, these are  
6       generic issues that apply to licensees across the board, and  
7       there is a public participatory opportunity when you go through  
8       the proceedings at the NRC, the Federal Register notice, the  
9       opportunity for comment, etcetera, etcetera.

10              I do not want to -- we would not want to see the NRC  
11       somehow use or view generic issues as an opportunity to be  
12       revisited.

13              I think case law is pretty clear here, first of all,  
14       but second of all, generic issues are very appropriately  
15       evaluated and resolved generically, and the industry feels very  
16       strongly about that, and that's an issue that's been back and  
17       forth here a little bit, and I just wanted to put that on the  
18       record, and that's government-wide.

19              There's nothing unique about the NRC with respect to  
20       how it handles rule-makings in the context of the notice and  
21       comment, etcetera, etcetera.

22              CAMERON:   Okay.   Thanks.

23              Let's take a break till 10 to.   That gives you about  
24       20 minutes.

25              [Recess.]

1 CAMERON: I'd just like to remind everybody to try to  
2 speak into the microphone, because people out here are having  
3 trouble hearing you.

4 I want to give you a chance to come back and comment  
5 on some of these things that we have discussed, but I wanted to  
6 ask Jay and others about an issue that Jay had raised this  
7 morning when we first began, and that was proceedings too long,  
8 which I'm distinguishing from a problem that I put up that  
9 Susan raised, which was delay by intervenor, underlying cause,  
10 perhaps biased decision-making.

11 We'll go back to explore that, but for example, I  
12 haven't heard anybody say we shouldn't have cross-examination,  
13 all right, as we look at the problems with the current process,  
14 and I've been told that there may be some implications for  
15 cross-examination as an underlying of proceedings too long, and  
16 this gets us into this case management issue as a potential  
17 solution, perhaps, to be discussed, but I guess I just wanted  
18 to make sure that we paid attention to this proceedings too  
19 long, and I think the word was "interminable" that Jay used  
20 this morning, and I guess I would just like to open that up for  
21 discussion, to see if people want to talk a little about what  
22 some of the underlying causes, perhaps, of these interminable  
23 proceedings are.

24 Jay?

25 SILBERG: Case management, I think, you know, solves

1 a lot of problems.

2 Interminability in some cases has been because  
3 decisions go unwritten or unissued, in some cases because  
4 discovery gets strung out forever, in some cases because I  
5 think cross-examination becomes endless and pointless, and  
6 there, I think, are cases where cross-examination is not worth  
7 doing, in some types of issues, in some types of proceedings,  
8 not necessarily across the board, although I think we can have  
9 philosophical discussions on whether cross-examination is,  
10 indeed, the engine of truth for scientific issues, and I think  
11 most writers, scholars have said it shouldn't be and there  
12 ought to be other mechanisms, Steve's experience to the  
13 contrary. I can say that since he's not here.

14 But I think that is -- I think that is one of the  
15 issues on schedules.

16 I think there are a variety of ways that that can be  
17 managed. Case management is one. Generic issues -- I agree  
18 with the latter part of the discussion before, that if we allow  
19 generic issues to be resolved by rule-making and then put back  
20 on the table, I think we're reversing 100 years of  
21 administrative law and Supreme Court case precedent that I  
22 think is fairly well accepted by almost everybody, at least,  
23 and I think, if -- in fact, one of my recommendations for the  
24 permanent repository 15, 20 years ago was we ought to try --  
25 the Commission ought to try to set forth the criteria more

1       precisely, and through rule-making, in order to take those  
2       decisions not off the table but to make them earlier, give  
3       people an opportunity to participate early on, and then it  
4       becomes simply a matter of establishing whether you fall within  
5       the parameters that have been established by the rule.

6               I think there are a number of areas where that's  
7       being done today.

8               In the Part 72 proceedings where people are now using  
9       the certified spent fuel storage casks in the rule-makings that  
10      have granted the certificates of compliance, I think that's  
11      been a very helpful addition to the process.

12              People are not frozen out. The same people who are  
13      proceeding, who are participating in our site-specific  
14      licensing case are also participating in the generic license of  
15      the casks, and their views are not being ignored or swept  
16      aside.

17              I think there are a variety of devices which ought to  
18      be used. Some of them are now. Some of them should be used  
19      more. Some of them aren't.

20              Tony's suggestion of a different kind of  
21      administrative review process was a very interesting one, to  
22      let the intervenors come in, to have everything totally  
23      transparent, they become a full party. We might not even  
24      charge them license fees to participate.

25              But I might well be willing to consider that provided

1 that, when you get to the end of that process, that's the end  
2 of the process.

3           You don't have hearings, because all the issues have  
4 been vetted in a, if you will, scientific, technical forum,  
5 everyone's had their day in court in a scientific and technical  
6 court, rather than a court of law, and we'll make the decisions  
7 that way.

8           That is, perhaps, more typical of the way technical  
9 decisions are made by administrative agencies if you want to  
10 look at new drug applications or FAA certifications or, you  
11 know, lots of other issues.

12           You don't have, you know, a public hearing before the  
13 FAA before you issue a type certificate for the 747, and you  
14 don't have a public hearing with intervenor funding before you  
15 approve some new drug.

16           Maybe that is worth exploring. I, for one, don't  
17 think, though, that Tony and his clients would be willing to  
18 make that part of the grand bargain, if you will, but I might  
19 well be willing to consider it.

20           CAMERON: Okay.

21           SILBERG: I think that's beyond the scope of this  
22 discussion a little bit.

23           CAMERON: Are there any other problems that we should  
24 get up here before we go back and discuss these, and we can go  
25 from most recent, since there seems to be some need to talk

1 about that.

2 Jill?

3 ZAMEK: It was brought up earlier about neutral  
4 presiding officers being a problem. Somebody else brought that  
5 up and I agree.

6 CAMERON: Good point. I mean that was a discussion  
7 we had.

8 SILBERG: Is the concern that the current ones are  
9 not or some of them are not?

10 ZAMEK: Correct, or with the changes, that perhaps  
11 they wouldn't be. So, it's just a concern that we make sure we  
12 have them.

13 CAMERON: Any other new problems that we want to put  
14 up here before we go back?

15 RICCIO: Not really a problem, Chip, but I guess I  
16 want to comment that we have already had a grand bargain,  
17 apparently, at least according to Commissioner Bradford, to get  
18 to the process where we are now, and now the industry wants to  
19 renege on that, the industry and the agency wants to renege on  
20 that promise.

21 CAMERON: So that everybody understands what you're  
22 talking about -- and I'm not sure, at least, that the agency is  
23 saying that it wants to renege on anything. I don't know about  
24 the industry, but could you let people know what you're  
25 referring to?



1               RICCIO:   Okay.

2               When we opened up this discussion this morning, I  
3               referred to a comment by Commissioner Bradford that, in order  
4               to get the current hearing rights that we currently enjoy, we  
5               had given away our rights to local -- as a local regulation of  
6               radiological health and safety and limits set forth in the  
7               Price Anderson Act.  At least that was his understanding of the  
8               grand bargain that was struck, and obviously, the industry has  
9               a different perspective on that grand bargain.

10              SILBERG:  First of all, Price Anderson was passed in  
11              1957.  The Atomic Energy Act and Section 189 was passed in  
12              1954.  So, we've got a three-year disconnect.

13              RICCIO:  At any rate, basically we have little faith  
14              that any grand bargain structure is going to put us in a better  
15              position to defend our rights, and again, I hate to be drawing  
16              us back to the SRM, but when I say the Commission wants to  
17              circumscribe our rights, I'm talking about the SRM.

18              We're heading down a path that they've already, you  
19              know, signed off on, the Commissioners all voted upon it.  So,  
20              why should we be talking about it as though it doesn't exist?

21              CAMERON:  Jim, could you -- this has come up several  
22              times, and there might be some different answers to what you're  
23              raising, including even though there is an SRM, the Commission  
24              also in that SRM asked for the staff to get early feedback from  
25              the affected interests.

1           That SRM is not necessarily written in stone, okay?  
2       The Commission can change their mind based on what they heard.  
3       But when you say that the SRM has set the scope here, is there  
4       a specific -- is there -- I'm not sure that the direction was  
5       that specific.

6           RICCIO: I was referring to setting out both on a  
7       legislative track as well as a rule-making track to basically  
8       change our rights from -- you know, under formal to informal  
9       hearings. That's what I'm talking about. Go ahead with option  
10      four, I think it was, in the SECY paper.

11          CAMERON: Joe and Larry, maybe you can address this,  
12      because I never read option four as making a decision about  
13      whether formal hearings should be eliminated, and I keep  
14      getting confused when you bring this up, Jim, and I see where  
15      you're coming from now, and maybe we should clarify this,  
16      because I don't think that it's as it might appear.

17          Joe?

18          GRAY: I think the option four was a -- is a proposal  
19      to proceed administratively with an exploration of ways to  
20      improve and de-formalize the agency's hearing processes and, at  
21      the same time, a proposal to seek legislation that would make  
22      it clear that the agency has the flexibility to de-formalize.

23          I guess we haven't read the Commission's SRM as a  
24      hard and fast direction to come out any particular way but,  
25      rather, we've read it as a direction to explore, do some of

1     what we're doing right here, and to come back to the Commission  
2     with a proposal as to how the hearing processes might be  
3     improved.

4             It's possible the proposal would be something along  
5     the lines of do nothing, but I think --

6             RICCIO:   Wasn't that an option they already denied,  
7     though?   Wasn't it one of the other options?

8             CAMERON:   I think this is an important point for  
9     people to understand.

10            GRAY:   At the outset, the Commission did not choose  
11     the "do nothing" option.   They basically said move forward,  
12     explore it, come back with a proposal.

13            CAMERON:   Which does not mean that the result has  
14     been dictated yet at this point.

15            ROISMAN:   With all due respect, Joe, before I talked  
16     about dis-ingenuity.   The Commission has made a decision that  
17     the General Counsel's rather extreme view of the 30 years of  
18     history, 40 years of history of this agency are meaningless  
19     when it comes to adjudicatory hearings.

20            That is the most fundamental question.   The  
21     Commission decided that.   This statement says they decided  
22     that.   This should, arguably, be appealable, if it had been  
23     made public in the usual way.

24            So, it's disingenuous to tell us that this train has  
25     not already left the station.   All that's left is whether or

1 not it's going to run over everybody on the track or only some  
2 of the people on the track, but this is a done deal.

3 And with all due respect, if you want us to  
4 participate in this process in a meaningful way, please don't  
5 patronize us with this.

6 That statement that reads, "The rule-making should  
7 outline the NRC's discretion and flexibility to determine the  
8 type of proceeding for hearings" is a massive sea change in the  
9 Commission's position, in our view, from what the Commission  
10 has stated and what Congress stated when the temporary  
11 operating license statute was passed in 1972, and if you look  
12 at the legislative history of that, which the General Counsel's  
13 memo does not address, it makes crystal clear that adjudicatory  
14 hearing rights are built into 189 and that they had to be  
15 continued in the temporary operating license.

16 So, the Commission wasn't even made aware of that  
17 piece of legislative history, but it's now made the decision,  
18 and the decision is that all we're going to talk about is how  
19 much damage you're going to do to the formal hearing process,  
20 not whether you're going to do damage to it, and I think we  
21 just ought to be honest about that.

22 CAMERON: Tony, I think that there still is -- there  
23 may be a legitimate misunderstanding here about that. I'm not  
24 sure that they're being disingenuous about that, although it  
25 may appear to be that way.

1           Larry, do you want to add anything to what Joe said,  
2 because it's a fundamental point.

3           CHANDLER: I had earlier said that I would not look  
4 at this as a pre-ordained course that we're embarked on, simply  
5 focused on how best to abridge the rights of the public to  
6 participate.

7           I think the Commission has charged the General  
8 Counsel with conducting, as Joe just said and I had said  
9 earlier, a reasonable, realistic, and thorough examination of  
10 the current processes to see where they could be improved,  
11 informalized where possible, to make the process work better.

12           I think if you look -- and you say it's a colossal  
13 sea change.

14           If you look back in the Commission's decision going  
15 back in West Chicago, they recognized there the tremendous  
16 flexibility afforded the Commission in defining its  
17 adjudicatory processes, and this is carrying forward, really,  
18 on that kind of analysis.

19           ROISMAN: (A) That's one court. (B) If what you and  
20 Joe are saying is true, then we would expect to see within a  
21 week a clarification memo.

22           CHANDLER: I don't think one is necessary.

23           ROISMAN: Well, then I think we've got a problem.  
24 Because if what you're saying is so, it's not what's said in  
25 there, and we can look at the words. If that's what the

1 Commission intended and there's an honest misunderstanding,  
2 then let them say that.

3 We're not talking about a rule-making. We're talking  
4 about a memorandum sent out by the Commissioners. It's not a  
5 complicated thing to do if they agree with what you and Joe are  
6 articulating to us.

7 CAMERON: Okay. Well, that recommendation is on the  
8 record, and I think there probably will be a summary of this  
9 meeting prepared for the Commission, and perhaps that will be  
10 forthcoming.

11 I think we have the problems identified. Let's go  
12 back and talk about them, but let's take these cards that are  
13 up right now.

14 Alan, you haven't spoken too much with us today. Why  
15 don't you tell us what's on your mind?

16 HEIFETZ: Well, I haven't spoken too much because  
17 I've been listening, and I've been trying to understand what  
18 the concerns are around the table.

19 It seems to me that, before we get hung up in the  
20 labels of what's formal or informal, we ought to look at what  
21 is the problem with the formal proceeding in the first place,  
22 and the one thing that I seem to see agreement on is delay, the  
23 length of time that it takes.

24 I heard about a seven-year proceeding. Well, a  
25 seven-year proceeding is not because of cross-examination of

1 witnesses in those cases.

2           So, it seems to me that you have to take a look at  
3 what causes delay in proceedings, and proceedings have to be  
4 divided into three segments -- the pre-hearing segment where  
5 you're doing your application, your staff work, and getting  
6 prepared for the hearing; the second is the hearing itself; and  
7 the third part is, after an initial decision, whether it's by  
8 an individual judge or a board or whatever, that decision then  
9 gets appealed.

10           In the usual course, in most agencies -- and again,  
11 I'm not speaking about the NRC. I don't know what happens at  
12 the NRC, but let me just tell you what happens everywhere else.

13           The greatest amount of delay that I have seen is from  
14 the time an initial decision is rendered and the time a  
15 commission renders a decision after the initial decision.

16           So, if that is a problem, then you have to start  
17 backwards and say what can we reasonably do to get an appeal of  
18 a decision decided quickly?

19           What I see people talking about is also a cross-over  
20 between part two, the hearing, and appellate aspect, and that  
21 is when you're talking about interlocutory appeals and you're  
22 talking about petitions for re-hearing on motions or whatever.

23           Those are also very calculated to delay proceedings,  
24 and perhaps you ought to look at limiting interlocutory appeals  
25 to -- the most extraordinary questions of policy are those that

1 present new questions and not just another bite at the apple,  
2 and the same thing on petitions for rehearing.

3 If you want case management, you want someone to  
4 listen to a motion on the one side, a response on the other  
5 side, and then make a decision, make a decision, then move on  
6 with the proceeding.

7 If the decision is a bad one and is error, it can  
8 always be appealed later, but this idea of trying to appeal  
9 everything piecemeal is something else that just delays and  
10 delays and delays.

11 Better to have a decision that's out there that you  
12 don't like and take a chance on appealing it and getting it  
13 reversed later on and see what the relief has to be rather than  
14 saying we've got to correct this thing now.

15 So, those are suggestions that I would have there.

16 The hearing process itself, the presiding officer  
17 does have to control the proceeding, whether it's an oral  
18 hearing or a paper flow hearing, and there are ways to do that.

19 Paul teaches a course in complex case management out  
20 at the Judicial College. I took that course out there before  
21 Paul arrived, and it was given by Federal District Court Judge  
22 Fred Lacey, who knew how to rocket docket before the rocket  
23 docket was invented, and there are ways to get people to do  
24 things quickly and still guarantee due process rights.

25 One of the things that he had suggested and that used



1 to be done all the time at some of the other regulatory  
2 agencies was to get all expert testimony in writing, direct  
3 testimony. The only oral examination of an expert witness  
4 would be cross-examination.

5 There's no reason to put an expert on the stand and  
6 to have that expert give direct testimony orally. Who wants to  
7 sit there and listen to his qualifications and all of this  
8 stuff? Put it in paper, and if there's any controversy, let  
9 somebody examine on it.

10 If you put his testimony in writing, then you get --  
11 there are two advantages.

12 From the sponsor's perspective, the testimony can be  
13 ordered beautifully and set out as best as you can possibly set  
14 it out. You don't take the chance of having an expert getting  
15 up on the stand and fumbling his testimony. So, that's from  
16 the sponsor's point of view.

17 From the cross-examining point of view, you get the  
18 testimony in advance of the hearing. You get a chance to let  
19 your expert look at it and analyze it and come up with a  
20 pointed cross-examination that does away with trying to think  
21 on your feet while you're there, but you're prepared to do it.

22 The only direct testimony you need for the expert  
23 witness in that case is you put him on the stand, you have him  
24 introduce himself, you give him his testimony, you say is this  
25 your testimony, he says yes. Do you have any minor corrections

1 to make? There's a typographical error on page 32, it's a  
2 period. Anything else? No. I tender the witness for cross-  
3 examination. That does away with a tremendous amount of time.

4 So, there are ways of doing that.

5 If you start to look at these ways of speeding up the  
6 hearing process, then what becomes a formal proceeding -- it's  
7 a formal proceeding, but it's a fast formal proceeding.

8 So, you're not concerned about saying, oh, get out of  
9 this formal proceeding, we've got to get to something informal.  
10 Well, something informal, depending on the way it can be  
11 structured, can be much slower than the formal proceeding.

12 The best cases that I ever presided over were ones  
13 where rules were practically nonexistent and I was able to sit  
14 down with the attorneys in a case and we prescribed a whole  
15 series of discovery functions and timing, motions practice and  
16 everything, and got the cases done in a very, very short period  
17 of time.

18 In regulatory reform, you can go from one extreme to  
19 another. I have a device that will give you the fastest  
20 decision in the world on any kind of a case, regardless. It's  
21 in my pocket, and it's called a coin.

22 Now, that's fast decision-making. It's not  
23 necessarily good decision-making, but if you want it fast, you  
24 can get it that way.

25 You can also get it much more slowly, and you can go

1 to a seven-year or a 12-year kind of scenario, but it is  
2 possible to conduct adversary adjudications within shorter  
3 time-frames and do it with all due process protections as long  
4 as you can come up with an agreement on how long should it take  
5 to do admissions, how long should it take to do  
6 interrogatories?

7 If you're going to do any kind of depositions, look  
8 to this prospect of saying that a deposition can only be one  
9 day, seven hours. Is that a possibility? How many witnesses?

10 If you look at it that way and you try to telescope  
11 down the time periods, you can have a full panoply of due  
12 process rights without stretching these cases beyond what is  
13 reasonable, and I think that's where your focus ought to be.

14 CAMERON: Okay. Thanks a lot, Alan. I think  
15 tomorrow we'll examine how we might make that work here and  
16 which of these problems that's going to address. The  
17 Commission does have a policy statement out of sorts on case  
18 management. It would be interesting to hear a discussion about  
19 the different perspectives on how well we're doing on case  
20 management and what do you do to make that better, and does  
21 that solve the types of problems that people are concerned  
22 about and that the Commission might be concerned about?

23 Let's hear what Bob has to say.

24 BACKUS: It's interesting we're talking about delay,  
25 because I don't know how that got injected into here, but this

1 is an example of where we need the case study that Tony was  
2 talking about. You have to look at, really, what was the  
3 delay.

4 Diane was telling me that, you know, the uranium  
5 enrichment thing down in Louisiana is often cited, and there  
6 were several years when the applicant abandoned the project  
7 that's not acknowledged when they talk about how long the  
8 proceeding took, and I could certainly explain the so-called  
9 delay on the Seabrook thing by numerous Commission  
10 interventions in the proceeding.

11 So, I think we need that case study to see whether  
12 delay is a real problem or just a handy thing that the  
13 politicians latch onto to castigate this agency, because all  
14 they see is the number of months or number of years it took  
15 from application to decision, and you need to know what's  
16 behind that.

17 I had a couple of other problems I was going to  
18 discuss, just let you list.

19 One is standing. As I was saying during the break to  
20 my friends here on my right, I don't think we should let  
21 standing become a big issue and spend a lot of time on it. I  
22 think we should let people in that want to get in, like you do,  
23 certainly, in our state court, with very broad standing, very  
24 liberal standing requirements.

25 Everybody has a great concern that ne'r do wells will

1       come in and screw up the process. I don't think that really  
2       happens. Litigation isn't bean-bag. It's hard work. It takes  
3       a lot of effort. It takes a lot of money, which most people  
4       don't have.

5               I don't think you're going to get people in if they  
6       don't have a genuine and legitimate concern, and if you do,  
7       that's what your presiding officer is there for, and he's got  
8       tons of authority under your CFR to handle non-productive  
9       participation, tons of authority that can be exercised.

10              So, instead of having all these fights over standing,  
11       I would let them in.

12              Same with the contention issue. I think we should go  
13       back to what the Commission said originally was the standard  
14       for contention. It was noticed pleading like you had in the  
15       Federal court. You know, the other driver negligently turned  
16       and ran into me and caused me injury, in violation of the rules  
17       of the road. Okay, you're in. Later on, you have to specify  
18       what that's all about.

19              But I would say let people in, open up the process,  
20       insist that meaningful discovery be done, and then you'll cut  
21       down on the cross-examination, which I agree with Steve we  
22       certainly can't forego, because it is the best engine for the  
23       discovery of truth, as Dean Wigmore once wrote.

24              End of speech.

25              CAMERON: Thanks, Bob.

1 Susan.

2 HIATT: I'll just pick up on a few points that have  
3 been made.

4 First, with regard to what Judge Heifetz talked  
5 about, the pre-filed written direct testimony, I would note we  
6 already do that under our rules of practice. So, it's already  
7 there.

8 Talking about interlocutory appeals, this is another  
9 case where the rules can work both ways. I recall in the Perry  
10 case where Jay filed a number of interlocutory appeals in the  
11 form of motions for directed certification to the Appeal Board.  
12 They were not particularly effective.

13 [Laughter.]

14 HIATT: Going back to this idea of this bargain that  
15 former Commissioner Bradford talked about, I recall seeing a  
16 NUREG that documented a process somewhat similar to this back  
17 in June of 1978, I know Tony was a participant in, and I  
18 believe it was Gerald Charnoff of Jay's law firm, was also a  
19 participant, and he made, remarkably, the same statement, that  
20 this was a trade-off between Price Anderson and hearing rights,  
21 that this bargain had already been struck back in the '50s, and  
22 that's documented. Maybe it wasn't documented correctly, but I  
23 have that NUREG, and it's in there.

24 CAMERON: Okay. Thanks, Susan.

25 Mal.

1           MURPHY: Some of you may wonder why I'm sitting here  
2           silently and not bringing up any problems.

3           I'm sort of limiting my participation in this effort  
4           to how it will impact the high-level waste repository, because  
5           my experience with other nuclear licensing is so old and musty  
6           that I don't want to embarrass myself by bringing it up, but  
7           I'm sitting here listening to the various problems that people  
8           are throwing out on the table, beginning with Tony Roisman, and  
9           realizing that most -- certainly not all, and some of the ones  
10          that Tony mentioned, definitely not, but many of the problems  
11          that people are mentioning with respect to the hearing process  
12          don't pertain to the high-level waste process as the pre-  
13          licensing proceedings, at least, because the potential  
14          intervenors, the state, the local governments, and the public  
15          itself is already afforded those same rights that people are  
16          sitting here talking about being granted in any changed hearing  
17          procedure.

18          But our process is so unique that I'm not certain  
19          that it translates easily to other licensing proceedings that  
20          the NRC might be engaged in.

21          For example, we have a statutory site  
22          characterization process where Congress has mandated certain  
23          interactions, certain cooperation between Federal agencies,  
24          etcetera. It's been going on for 17, 18 years now.

25          There have been dozens, probably hundreds of informal

1 meetings between the NRC staff and DOE, technical exchanges, as  
2 we call them, between the NRC staff and DOE, Appendix 7  
3 meetings, which are another kind of even less formal  
4 interchange between DOE and the NRC, and all of those meetings  
5 are open to the public.

6 We attend them. We have an on-site representative  
7 designated who has an office in the DOE offices in Las Vegas,  
8 who has another office available to him out at the -- out at  
9 what's called the Field Operations Center, next to Yucca  
10 Mountain itself.

11 There's daily contact with the Department of Energy,  
12 with the NRC on-site representatives, whose office suite is  
13 next -- you know, almost adjacent to the Nye County office  
14 suite in the Department of Energy building.

15 The members of the public can attend any of those  
16 meetings, and do. Judy Trikle, who represents the Nevada  
17 Nuclear Waste Task Force, a public citizen's group, is at  
18 virtually every single meeting. Citizen's Alert attends some.  
19 NRDC could attend if they wanted to. Anybody could attend if  
20 they wanted to.

21 So, many of the things that you're bringing up as  
22 concerns and problems that tend to slow down the hearing  
23 process, because public interest groups or public citizens or  
24 intervenors or however you want to designate them have this  
25 tremendous job of catching up once the license application is



1 filed, don't necessarily apply in our case.

2           The other major difference -- and you might -- those  
3 of you who are on the table who aren't familiar with it might  
4 take a look at this evening, and we could talk about it  
5 tomorrow, I guess -- is sub-part J, which itself, in a sense,  
6 constitutes a grand bargain.

7           It was a large grand compromise that Jay Silberg and  
8 I can take some personal credit for crafting in which all  
9 sides, for the only time in the high-level waste process, at  
10 least, gave up something in exchange for something else that  
11 they thought was in their interest.

12           DOE, the NRC, the State of Nevada, the local  
13 governments, the environmental groups, all with differing  
14 interests in the program, were able to fashion a compromise  
15 which produced the original sub-part J, the so-called licensing  
16 support system rules.

17           They have since been added to and subsequently  
18 amended to change the licensing support system from a stand-  
19 alone, monolithic, huge, very expensive system to a web-based  
20 document exchange system, but assuming that thing is going to  
21 work -- and I remain confident that it will -- we're not going  
22 to worry about discovery, document discovery, because everybody  
23 who intends to participate in the hearing, in the licensing  
24 process, as a pre-condition to that participation, is going to  
25 be required to post all of their relevant documents and

1 documents which are likely to lead to the discovery of relevant  
2 evidence, of admissible evidence, on a web-site and make them  
3 available over the internet.

4 Nye County is in the process of upgrading our web-  
5 site right now. The Department of Energy, which has a massive  
6 problem, because they've got hundreds of thousands of documents  
7 to deal with, has been working on it for years.

8 So, a lot of these problems, you know, aren't going  
9 to exist in the context of the high-level waste licensing  
10 proceeding because of the tremendously long lead times involved  
11 and the fact that the public, through their representatives,  
12 has been able to participate so extensively throughout the  
13 process, and it may be, rather than throwing the baby out with  
14 the bath-water -- and I don't like to use the words again, but  
15 I guess I have to, in talking about going from an informal --  
16 and there are some licensing cases today, obviously, wherein  
17 formal rules are perfectly valid, but rather than going from a  
18 formal to a more informal rule-making model, it may be useful  
19 to take a look at what's been happening for years in the high-  
20 level waste -- in the Yucca Mountain program to see if there  
21 isn't some way that the public can't get involved in this  
22 process at the outset.

23 We don't get internal staff memoranda. We don't get  
24 dissenting opinions routinely. We don't get invited to  
25 meetings where two Department of Energy scientists are beating

1 on each other or where the NRC is questioning the work done by  
2 its own Center for Nuclear Waste Regulatory Analysis, etcetera,  
3 and I'm not sure that any process we could fashion would ever  
4 go that far, and I'm not sure it's desirable to do so in the  
5 first place.

6 But short of those kind of things, I already enjoy  
7 all of the things that most of you have identified as concerns.  
8 Sorry, but that's just the way it is.

9 [Laughter.]

10 MURPHY: This also, of course, excludes the, to many  
11 of you, I know, very critical issue of funding. We are funded.  
12 We're funded directly by an appropriation from Congress out of  
13 the nuclear waste fund.

14 We're certainly not funded as well as we ought to be,  
15 you know, and it certainly inhibits, and it's going to limit  
16 the kind of issues we'll be able to deal with in licensing, and  
17 it's forced us to prioritize what things are really truly  
18 important to the Nye County program and which ones aren't, but  
19 we do have money available to allow us to participate in the  
20 program.

21 All of these other things that I've been talking  
22 about, of course, presuppose that from somewhere, either  
23 utility funding, funding from Congress, or bake sales, the  
24 traditional method of funding intervenors, that somehow there's  
25 a few dollars available to do this.

1 CAMERON: And I would just note, before I go to Jay -  
2 - I think you want to amplify on some of Mal's remarks -- that  
3 although the government entities might be receiving funding,  
4 the citizen group community is still in the same --

5 MURPHY: They were at one time. The Nevada Nuclear  
6 Waste Task Force received a grant from the State of Nevada's  
7 Nuclear Waste Policy Office. That is no longer the case for a  
8 couple of reasons.

9 The principle citizens group which is actively  
10 involved in the Yucca Mountain program right now has raised its  
11 own money. They have no outside source of funds, and they have  
12 no program source of funds whatsoever.

13 CAMERON: Okay.

14 Jay, do you want to just tie on to Mal's sub-part J,  
15 and then we'll go to Diane and then down to Tony?

16 SILBERG: I was actually going to expand on that a  
17 little bit. The repository process is not the only one in  
18 which the bells and whistles are available. In fact, in our  
19 current EFS case, we have put on the record every document, you  
20 know, that we have.

21 The entire four-volume calculation package was made  
22 available a month after the application was filed and several  
23 months before contentions were due to be filed.

24 The meetings are all open. In fact, our problem is  
25 that we can't have meetings with the staff on a as-needed

1 basis, because we have to have this two weeks pre-notice. So,  
2 by the time we need to get something done, it's too late if we  
3 give the notice, you know, that the staff is insisting on.

4 So, actually, it's getting in the way of interactions  
5 between the applicants and the staff, but it is and has been  
6 from the beginning a very, very transparent process.

7 We have an open document discovery where all relevant  
8 documents on both sides have been made available from the very  
9 beginning, courtesy of Judge Bollwerk, and we have a massive  
10 document room out in Salt Lake City that is free and open  
11 roaming for the intervenors out there.

12 Most of those don't have a funding problem because  
13 the State of Utah has a much larger budget than I think we have  
14 as the applicants and maybe more than the staff has, and I  
15 think that's probably more true today in reactor cases, as  
16 well.

17 Certainly, in the Baltimore Gas license renewal case,  
18 there were tens, maybe hundreds of meetings that were open to  
19 the public years before the application was put on file.

20 Sections of the application in draft form were made  
21 available to the public, put in the public document room.

22 This was an extremely open process, and I think to  
23 say that, you know, you get involved in the marathon in mile 25  
24 and you've got to catch up, I think, is overstating it quite a  
25 bit.

1           There's, from our standpoint, probably more openness  
2   than is good for the technical review right now because it gets  
3   in the way of the interaction rather than assist the  
4   interaction.

5           MURPHY:   Some of these in the Yucca Mountain -- talk  
6   about transparency -- for some of these meetings -- and I don't  
7   mean the public meetings of the ACNW or the meeting that you're  
8   going to be facilitating next Tuesday, for example, Chip, but  
9   for some of the informal interactions between the staff of the  
10   NRC, the staff of DOE, etcetera, we have members of the press  
11   there.

12           I've been to meetings in which television cameras  
13   were present in the room when people were hassling out whether  
14   or not some, you know, section of the total system performance  
15   assessment was based on adequate modeling.

16           It's an extremely transparent, open program, and like  
17   I say, because of the unique nature of that, I don't know that  
18   translate all of them to any other licensing proceeding, but it  
19   seems to me you can transfer quite a bit of it.

20           CAMERON:   Okay.

21           Tony brought up this morning -- and Bob just referred  
22   to it -- this aspect of doing a careful evaluation of existing  
23   cases to see exactly what works and what doesn't, and Bob tied  
24   it to delay.

25           That's a solution in terms of trying to address this

1 problem.

2 I think that the things that Mal said and Jay said  
3 and Judge Heifetz are starting to get us to potential solutions  
4 for the problems.

5 In the case of sub-part J or the private fuel  
6 storage, there may be lessons learned right within the NRC  
7 framework at this point that could be more carefully explored  
8 or taken advantage of it.

9 MURPHY: Let me just say one word about standing,  
10 too, before I forget about it, because I want to help out my  
11 friend, Jay Silberg here.

12 We talk about standing in the context of the  
13 environmental and citizens groups being denied access to this  
14 process from time to time, and I've always considered it  
15 somewhat preposterous, for example, that under -- things may  
16 have changed in the last 10 years since we first started  
17 talking about this, you remember, Jay, in the LSS negotiations,  
18 but at that time, at least, the NRC took the position that the  
19 utilities themselves, which were funding almost the entire  
20 high-level nuclear waste process, would not have standing to  
21 participate in the licensing proceeding, because interest had  
22 to be something other than financial or economic interest, even  
23 though you were paying the -- like I say, except for the  
24 defense waste -- the entire freight.

25 So, if we're going to liberalize standing rules,

1       which I absolutely support, Bob, we ought to liberalize them to  
2       the extent that Jay Silberg's clients can get in the door, too,  
3       just out of a sense of fundamental fairness.

4               CAMERON:   Okay.   Thanks, Mal.

5               Diane.

6               CURRAN:   A minute ago, Chip, you made a general  
7       reference to these problems, and I think my big problem is that  
8       I don't know what the problem is.

9               When I read this staff requirements memo, I took it  
10      as basically a declaration of the death knell of the formal  
11      hearing process for NRC adjudications, and I still don't know  
12      why, and you know, we've had a really interesting discussion  
13      here today, and we have put some good things on the board, but  
14      I still don't know why, and I am guessing that this comes out  
15      of a process that started summer before this past summer, after  
16      the LES withdrew its license application and Chairman Jackson  
17      was called on the carpet before some members of the Congress  
18      and basically read the riot act, and then, shortly after that,  
19      I was in the middle of a proceeding where we got an extremely,  
20      extremely tight and draconian schedule and were told by the  
21      presiding officer I can't help it, I have been ordered by the  
22      Commission that we have to clamp down on license proceeding  
23      schedules.

24              I am guessing that this is just another reaction to  
25      that kind of political pressure, because it doesn't reflect any



1 kind of reasoning by the Commission.

2 We're concerned about X, Y, or Z, and therefore,  
3 we're doing A, but we want to go from formal to informal  
4 hearings, and I would just really urge the Office of General  
5 Counsel, when you're dealing with this, go back through the  
6 Commission -- I know this has been said before, but go back  
7 through the Commission and ask what is the problem, what do you  
8 want us to look at, and don't take this discussion today as the  
9 homework that needs to be done.

10 A great deal more -- first of all, the issues have to  
11 be clarified, and then a great deal of work has to be done. We  
12 have a process that's been going on for many, many years, and a  
13 very vague proposal to completely change it.

14 CAMERON: If anything, this discussion today might  
15 only demonstrate that there is not a wholesale problem with the  
16 formal hearing process that needs to be fixed by going  
17 informal, and the staff is going to communicate with the  
18 Commission about the perception that's presented by the SRM,  
19 and I think that we need to do a better job of explaining that.

20 The only way that I can explain it -- and perhaps Joe  
21 and Larry can think about this overnight and we can try to do a  
22 better job of it this morning -- is that the so-called  
23 legislative solution or legislative option is independent of  
24 any policy-based conclusion that the Commission has reached  
25 that the formal process should be changed in a wholesale way,

1 and that may be hard to glean from reading that, but I think  
2 that that might be the intent.

3 But I don't want people to -- I mean we can -- one  
4 solution to this is to go to the Commission for clarification,  
5 as Tony suggested and you're suggesting, but I would like to  
6 hope -- I would like to think that we could perhaps provide  
7 some clarification on this before the meeting adjourns  
8 tomorrow, but we'll have to see if we can do that, and I think  
9 that we understand -- the staff understands what your concern  
10 is.

11 CURRAN: That's quite a major undertaking to get  
12 legislation passed just so you can keep it in your back pocket.

13 CAMERON: All right.

14 Tony?

15 THOMPSON: I think that we ought to recognize  
16 something here that we haven't brought up today, and that is  
17 that it is not only -- the delays involved are not only the  
18 result of the hearing process.

19 They are frequently part and parcel of the licensing  
20 process itself that goes on and on and on and on either because  
21 there maybe aren't the resources or people don't want to face  
22 up to the problems, whatever it is.

23 So, it isn't just the hearing process. Sometimes,  
24 when the hearing process becomes ponderous and is tacked on to  
25 the tail-end of a ponderous licensing process that you get a

1 problem, and then to have somebody come in at the last moment  
2 and say, well, now, I want to redo the whole thing, I want to  
3 re-look the whole thing, it seems to me that's unreasonable.

4 I think, you know, if you, for example, in the  
5 relicensing of reactors context, know which reactors are going  
6 to be applying to relicense and the information is public, then  
7 if you're interested in it, you ought to go and get involved,  
8 but don't get involved three years after the -- or four or five  
9 years after the licensing process has gone its whole self,  
10 there's been an ER or EIS or whatever it is, and then say in  
11 the hearing we've got to go back and redo this.

12 That's not fair, and that's not appropriate, and  
13 there's no excuse for it, frankly.

14 If you're interested in it, then you need to get in  
15 it from the beginning, as far as I'm concerned.

16 Now, one of the things I know in NMSS did here  
17 recently was to set up completeness reviews so that when a  
18 license amendment comes in or a license application comes in,  
19 within 90 days they will tell you whether it's complete enough  
20 to go forward or -- it doesn't mean it's absolutely complete,  
21 but it's complete enough to go forward, so that you don't wind  
22 up, three years down the road, with the staff saying this is  
23 incomplete.

24 So, there are probably things that the staff can do  
25 in the licensing context that are just as important as looking

1 at problems with the hearing process.

2 I commend to your attention the Court of Appeals  
3 decision in the Enviro-Care versus Quivira and International  
4 Uranium Corporation case. This came down here, I guess, last  
5 week. Two important things in that.

6 It has to do with standing, and it basically upholds  
7 the Commission's position that a competitor who's really only  
8 alleging the fact that the license amendment granted to the  
9 license applicant or amendment applicant -- the only complaint  
10 is that this will injure, in this case, Enviro-Care's  
11 competitive status is not a basis for standing.

12 The Commission held this in two cases, and it even  
13 then goes on a little further. The Commission said we're not  
14 going to allow a competitor, for example, to come in and abuse  
15 our hearing processes and our regulatory processes for their  
16 own personal reasons.

17 The other important thing that this case says and  
18 which Professor Lubbers, I'm sure, will be interested in is  
19 that, when the Commission makes a decision about its hearing  
20 processes, including the issue of standing, it isn't an Article  
21 III court, it is interpreting the Atomic Energy Act, it gets  
22 Chevron protection.

23 If the statute is ambiguous and the Commission's  
24 position is reasonable, the Commission's decision gets Chevron  
25 protection.

1           If the Commission were operating under the  
2   Administrative Procedures Act, it would not get Chevron  
3   discretion, because that's a statute that's applicable across  
4   the board to agencies.

5           So, it is directly relevant to the issues that we've  
6   been discussing today.

7           CAMERON: Okay. Thanks, Tony.

8           Let's go to Joe and then George and to Ellen and then  
9   come back to Tony.

10          Joe?

11          GRAY: Just a couple of clarifications, I guess, and  
12   I'm not going to talk about the SRM.

13          Chip, you asked about cross-examination and  
14   protracted cross-examination and the effects of that. I have  
15   not heard for the last 13 or 14 years complaints about  
16   protracted cross-examination.

17          In fact, since sometime in the early '80s, when the  
18   Commission put out one of its earlier policy statements on  
19   adjudications where they suggested that plans should be used, I  
20   think the licensing boards have been fairly astute at  
21   controlling cross-examination, and if it's not controlled by  
22   the board itself, the parties have the opportunity to control  
23   it by the various objections that are available.

24          So, the law I know, at least, any assertion that  
25   cross-examination is a problem is not supportable.

1 CAMERON: Okay. Thank you, Joe.

2 GRAY: Just a clarification on a couple of other  
3 points made somewhere along the way here.

4 As an independent agency, we do not have to submit  
5 legislative proposals to OMB except those that concern our  
6 budget. So, legislative proposals directed to hearing  
7 requirements would not have to go to OMB.

8 We do have a statutory bar on intervenor funding, and  
9 if there is a proposal to consider intervenor funding, we would  
10 legislatively have to do something.

11 Finally, I guess I had a question about -- one of the  
12 problems or concerns that have been put up on the sheets there  
13 was a concern about eliminating issues by rule-making, and I  
14 guess, to the extent that you can give some clarification on  
15 the basis for that concern, it would be helpful, I think.

16 I note, for example, that the rules that set out  
17 standards and whatnot are intended generally to resolve  
18 problems generically, applicable to all licensees and  
19 applicants, and I guess, if -- I just don't see what problem  
20 there is with a generic resolution.

21 Our rules of practice also provide for waiving a rule  
22 or setting aside a rule in an individual case if it can be  
23 shown that the rule doesn't apply in the particular  
24 circumstances.

25 That is available, admittedly a high standard, but it

1 is there for those cases where the rules, particular  
2 substantive rules really can be shown not to apply in that  
3 particular case.

4 So I guess I'm sort of at a loss for the reason why  
5 resolution through rule-making is --

6 CAMERON: What I would like to do is to ask Jim and  
7 Jill and Tony to perhaps address that tomorrow when we get to  
8 that particular problem, okay, so that we can give some other  
9 people time to finish up here tonight, but I think that some  
10 further explanation is needed about whether that's always a  
11 problem or whether that is only a problem in particular  
12 circumstances, the way that it's used.

13 Let's go to George now and then Ellen.

14 EDGAR: I want to make sure that at least my view is  
15 understood, that I think there are a number of things that need  
16 to be done to fix the process. I think it's a process that  
17 does have within it considerably uncertainty, lots of  
18 unpredictability.

19 There are some very positive improvements out there  
20 that I think should be considered for codification.

21 In the case management area, many of the things that  
22 the Judge talked about are in place already. I think, in  
23 particular, though, the Commission policy statement on  
24 adjudications has had its effect. It has imposed a discipline  
25 on hearing milestones.

1           I think, also, the notion of active Commission  
2 oversight, Commission intervention in the process is an  
3 important feature of control, and it's an important feature for  
4 the Commission to make sure that its policies are understood.  
5 That should continue.

6           Historically, if you look for the largest single  
7 cause of licensing delays and trace the critical path through  
8 most of the cases, you'll find that a good deal of that  
9 critical path is tied up with the staff milestone documents,  
10 the FES, the SER, and whatnot.

11           That seems to be an area, to me, that's under  
12 significantly improved control. The staff's performance in the  
13 license transfer area and on renewal are both extremely  
14 positive.

15           I think the notion of contention thresholds,  
16 particularly with the current rules, are good, that they should  
17 continue.

18           One area of weakness and uncertainty historically  
19 which I think ties into the purpose that you ascribe the  
20 hearing is the sua sponte authority of the licensing board. I  
21 would eliminate it entirely.

22           It is circumscribed already, and it does require  
23 Commission review, but if the purpose is essentially dispute  
24 resolution, then you don't need sua sponte, shouldn't have it,  
25 and I would suggest that the purpose of the hearings should not



1 be educational, it should be simply dispute resolution.

2 Time for decisions -- I think there is an area where,  
3 historically, there has been a question-mark. None of us have  
4 quite found the time-line for a decision to be predictable.

5 I think, generally speaking, there's a recognition of  
6 that, but that's an area where I suppose all we have now is  
7 some sensitivity that's been borne out of some of the cases.

8 In terms of cross examination, I'm well aware of  
9 cases where I think it's been excessive and non-productive. It  
10 is certainly not true in all cases.

11 There are many types of cases -- and I think that's  
12 on the agenda for tomorrow -- where cross-examination is an  
13 important engine for finding the truth, if you will,  
14 particularly cases such as individual enforcement, where the  
15 question of an individual's conduct might be at issue.

16 In terms of scientific exchange, I'd have to say that  
17 I'd align with Jay on that, that that's not an area where  
18 cross-examination is always productive. I would not start with  
19 a presumption that, on scientific issues, you would have it.

20 I would exchange testimony, I would look for  
21 conflicts, and I would give the boards the authority to order  
22 cross-examination on very specific areas if that were to aid in  
23 the decision.

24 The staff role has always been a subject of some  
25 discussion. The staff is the ultimate licensing authority.

1 They are delegated the authority to issue the license. The  
2 licensing board's hearing would modify the -- or the licensing  
3 board decision would modify the staff license decision, but it  
4 would seem to me there shouldn't be a presumption that the  
5 staff would have to be a party to the hearing, that the staff  
6 could have the discretion as to whether or not they'd  
7 participate.

8 Where there is an issue in which they have a stake,  
9 an issue, then certainly they should be allowed to participate,  
10 but otherwise, I wouldn't establish the presumption.

11 The final thought is that, when I look at the  
12 question of public participation -- Jay mentioned a number of  
13 instances of recent experience where other forms of public  
14 participation than the hearing process have been effective. I  
15 can think of a number of areas.

16 The Commission's open meeting policy has been in  
17 place for some time, it is observed.

18 I think Millstone restart is a good example of a  
19 situation where the staff opened up the process, local public  
20 meetings, a whole series of Commission meetings.

21 The Union of Concerned Scientists letter was, I  
22 thought, well taken. It simply said I don't agree with the  
23 decision to restart, but you gave me the opportunity to be  
24 heard, and so, there is a positive endorsement of the process.

25 I think we've been through several ugly, hotly

1     contested licensing cases that, at least two, we've been able  
2     to settle, provide intervenors with access to information that  
3     really has to do not so much with whether or not the facility  
4     should be licensed but how the facility should be licensed,  
5     under what conditions and what the state of compliance is.

6             We spent the better part of three years with an  
7     intervenor group at one site, working with them, not always  
8     agreeing with them, but at least giving them access to  
9     information so that they could assess the level of compliance,  
10    in exchange for which they gave up their hearing rights, but I  
11    think if you talk to them about it, they would tell you that  
12    they got more out of that access to information than they got  
13    out of hearing participation.

14            I can't speak for them, but I have discussed it with  
15    them.

16            So, when I look at this picture, I think we've still  
17    got a way to go to improve this hearing process. I wouldn't  
18    stop here.

19            I don't know whether "wholesale" is the right term  
20    but certainly it needs to be looked at carefully, and it needs  
21    to be looked at in a way that does not assume that this process  
22    should remain as it is.

23            CAMERON: Okay. Thanks, George.

24            I think people -- although you can't speak for that  
25    particular group, people might be interested tomorrow, when we

1 talk about potential solutions, you know, in a description of  
2 what particular process that you're talking about.

3 EDGAR: Sure.

4 CAMERON: Ellen?

5 GINSBERG: Thanks.

6 I just wanted to put on the table, in response to  
7 what Diane has said, you know, this looks like an -- you  
8 indicated that this looks like an activity in search of a  
9 problem, and I think the industry's position is that putting it  
10 that way may not be accurate, but there are certainly  
11 improvements that should be made to this process and that there  
12 are improvements available that could assist in many different  
13 productive ways.

14 We are not satisfied with the process as it is. We  
15 think there are improvements. We will be encouraging the NRC  
16 to make those improvements.

17 Some of the ones that George just identified, some of  
18 the other ideas, models -- sub-part J, sub-part M might be  
19 another model -- we think are very applicable to other  
20 proceedings than just those for which they are currently being  
21 used.

22 So, to crispen a response, I wanted to be clear that  
23 the industry does think there's a need to not only re-look but  
24 to make potentially significant improvements to the process.

25 CAMERON: Okay. Thanks, Ellen.

1 Tony?

2 ROISMAN: Two things.

3 Number one, when we talk tomorrow, I think one of the  
4 things that we ought to think about is solutions that do not  
5 involve the Commission, because that's what George is talking  
6 about.

7 He's talking about the utility and the interested  
8 party, intervenor, working out a deal, and maybe the laboratory  
9 that now exists from experience up until now is a spotty  
10 laboratory, it doesn't have good -- everybody's been talking  
11 about good science. It certainly doesn't have good science.

12 But let's just take -- just give you some  
13 hypotheticals.

14 You have a licensing hearing coming up. You've got a  
15 utility that says, boy, I'd really like to get this thing  
16 decided fast, and what I'd like to do is I'll go find who the  
17 interested intervenor groups are, I will fund them in exchange  
18 for what I want to bargain for.

19 I will give them the money necessary to do what they  
20 think they need to do to convince themselves either that this  
21 is okay or to convince themselves there are problems that they  
22 want to air and to go out and get them aired in whatever way,  
23 and then, I, the utility, want something back. So, there would  
24 be an intervenor funding option.

25 Another option would be George's proposal. We will

1 give you complete access inside the plant and inside the  
2 company to how things are going on, you'll be part of our  
3 internal decision-making, and you'll have some voice in all of  
4 that, and in exchange for that, you give up all hearing rights.

5 Here's another model. Okay. Let's try that.

6 I think the thing that would be really a disaster is  
7 to have the Commission start -- first of all, you buy yourself  
8 a lawsuit, you buy yourself a long delay, so no one's really  
9 going to benefit from that.

10 If the Commission, particularly on the basis of the  
11 available record, goes out and follows this SRM along the lines  
12 of laying out a little tool box of weapons that it can draw on  
13 whenever it feels like it wants to fore-shorten intervenor  
14 rights, it's going to just find itself tied up in nothing but  
15 litigation. Doesn't make sense to me.

16 It makes much more sense -- I'm a believer in  
17 negotiation, not litigation. You would think, based on my  
18 career, that I don't follow that. I've just had the  
19 unfortunate result of always running into people who believed  
20 in litigation instead of negotiation; they closed off the  
21 options.

22 For purposes of tomorrow, I think one of the things  
23 we ought to put on the table is a set of options that we could  
24 try in the laboratory without doing anything with the  
25 Commission at all.

1                   That's number one.

2                   Number two --

3                   EDGAR: Your choice of opponents is bad.

4                   ROISMAN: Well, we've finally got some decent  
5 opponents. Took a while. We had to drive a few other law  
6 firms, but we got to some people we could talk to.

7                   But I want to talk about some practical  
8 considerations, because I think there is one thing -- and this  
9 is certainly a case of I'm the blind scientist and I put my  
10 hand on the elephant and I think it looks like a long, thin  
11 tube.

12                   That's my picture of the elephant. Maybe the  
13 elephant really looks very different than that.

14                   But in my experience, most of the things that  
15 utilities are upset about, legitimately upset about in terms of  
16 delay, have to do with the efforts of intervenor groups to do  
17 the best they can with what they've got. Let's take cross-  
18 examination as an example.

19                   I certainly confess -- if this were an AA meeting, I  
20 would stand up and say hi, I'm Tony, I'm a cross-examine  
21 abuser, and the truth of the matter is that we don't do that  
22 because we love it or because we even think it's a very good  
23 way to get information. We do it because it's all we've got.

24                   Nobody in their right mind would want to spend all  
25 that amount of time doing cross-examination, but you don't have

1 to spend any money, except your presence, to do that. To take  
2 a deposition, you have to spend a great deal more money.

3 You have to go there, you have to order a transcript,  
4 you may even have to pay for the witness to come if the other  
5 side really wants to be tough about it, etcetera, etcetera.

6 Interrogatories -- I can tell you I have spent weeks  
7 writing interrogatories until my hand fell off. Why would I  
8 spend that much time writing interrogatory? Because I couldn't  
9 afford to do a deposition, and I didn't want to wait for the  
10 hearing to find out the answer to the question.

11 So, I would write thousands of interrogatories,  
12 hoping that maybe somewhere somebody would answer it without  
13 talking to their lawyer first and I'd actually find out  
14 something, but it was the only tool that I had.

15 I think that is the reality of what happens in this  
16 licensing process.

17 Now, I know that the Congress of the United States  
18 has forbidden the Commission to intervenor funding, and I don't  
19 think any of the solutions that are coming from the intervenor  
20 side of the table are possible here unless and until we bring  
21 to the table, if you really want to have a negotiated rule-  
22 making, so to speak, as opposed to an imposed rule-making, the  
23 relevant congressional people and they sign on.

24 If they don't sign on, there's no deal, there's  
25 nothing, because yes, they can stop it, and they've already



1 stopped it, but I feel that the underlying problem is that it's  
2 hard for you -- and the problem that I think Tony mentioned  
3 where they kept giving the intervenor another change and giving  
4 the intervenor another chance -- why did they keep doing that?

5 Because at root, lawyers, in general, and hearing  
6 chairmen, in particular, realize the inherent unfairness of  
7 telling some little old lady from Iowa that she's got to figure  
8 out why it is that the pump doesn't work, and she tries to do  
9 it the first time and she doesn't quite get it right, and his  
10 technical guy says, you know, there may be an issue here, so he  
11 says, well, I'm going to give you another chance and I'm going  
12 to give you another chance. You give the little old lady the  
13 resources to hire herself a pump expert and then you don't have  
14 to give her more than one bite at the apple; by God, she gets  
15 it in.

16 So, you can be very tough on equally funded people,  
17 but it's very, very hard to be tough on them when they don't  
18 have the resources to do what you're wanting them to do.

19 Now, you can run them over. You can steamroll them.  
20 You can just push them aside and go ahead and do your thing,  
21 and then, whatever the consequences of that are, they are.

22 I think, from the perspective of the utility and the  
23 Commission what happens is that you end up with less safe  
24 facilities getting licensed, and from the perspective of the  
25 society, you end up with the possibility of a lot of disruptive

1 activity, but that's a possibility.

2 But if the real plan -- if that statement that was  
3 back up there is something that we all believe in, I want you  
4 to understand where intervenors come from when they take longer  
5 to do something.

6 They come from that because they don't have the  
7 ability to do it in less time, and if they have the ability to  
8 do it in less time, as much as some may squeal about it, they  
9 can then be expected to act on the basis of the same kind of  
10 time schedules that everybody else can meet.

11 Now, lastly, this issue about the applicants not  
12 getting their act together, or the staff, and then getting  
13 another chance and another chance -- someone told me this once,  
14 and now the General Counsel's office people can correct me if  
15 I'm wrong.

16 I believe that the Nuclear Regulatory Commission does  
17 not have the authority to deny licenses.

18 It only has the authority to say, on the basis of the  
19 available record, the license will not be approved, that no  
20 utility can ever be told no and never come back again, the way  
21 an intervenor can be told no and never come back again, and  
22 that that is one reason why there's never a resolution of the  
23 case where the utility has just -- or the staff, whoever, has  
24 just failed and it's over, it's ended, and I don't know whether  
25 that's built into the statute or practice or whether I'm just

1 wrong about that, but I do know that that's one reason why, in  
2 these hearings, when the intervenor finds a flaw, we don't go  
3 to a verdict, we go to a delay which then allows the other side  
4 to try to fix the flaw, and then we come back and do it again,  
5 and that may be delay.

6 I don't think it's our fault. I don't know whether  
7 it's built into the system or not, but I certainly have seen it  
8 happen in the licensing hearing process.

9 The last thing I want to say is -- because I know you  
10 want to talk about this generic question, and somebody raised,  
11 you know, what are these generic issues.

12 GESMO -- just about the time we thought we had the  
13 mixed oxide fuel thing locked. The Commission took out of  
14 GESMO the only issue that anybody cared about, proliferation.

15 Nuclear waste disposal -- we had the construction  
16 permit for Seabrook stopped over the failure to consider the  
17 nuclear waste issue in the NEPA process. The Commission took  
18 it away from us and said no, no, we're going to do it  
19 generically.

20 The history of this agency is, whenever the  
21 intervenor gets you guys really good, you change the rules on  
22 us.

23 So, should you have the right to make generic rules?  
24 Of course you should. Is that a sensible, fair thing to do?  
25 Yes, it is. But it's been done in a way that has made us very

1 skiddish and very nervous, and so, we feel like we're always  
2 getting screwed. It's the ultimate Catch-22.

3 GRAY: Okay. So, it's a concern about last-minute  
4 rules when you've got an issue that the Commission then says  
5 no, take that away.

6 ROISMAN: They didn't mention re-racking. They did  
7 it on re-racking, too.

8 CURRAN: License renewal.

9 RICCIO: License renewal. There's more to it,  
10 though, too. I just want to get this out, because I may not be  
11 here tomorrow. I haven't decided yet.

12 The problem is that you're genericizing things that  
13 people don't even know are going to be -- you know, affect  
14 their interests at all.

15 Site-banking, for instance, you know, under the new  
16 one-step process -- how does someone know that they're going to  
17 build a reactor there 30 years ahead of time or 20 years ahead  
18 of time, I think is the date. How do people who don't even  
19 know their license is going to be renewed yet address the  
20 generic environmental impact statement on relicensing?

21 I don't even know the 22 reactors you guys are  
22 talking about. How does someone in the general public have an  
23 opportunity to comment on a generic rule-making that may affect  
24 their interest when the industry hasn't even decided whether  
25 they're going to renew yet?

1           It's basic fairness questions.

2           CAMERON: We'll be back tomorrow for further  
3 discussion of this to see if we can at least suggest some  
4 legitimate constraints on the use of generic methods to take  
5 issues off the table but also for other reasons.

6           Tony's second point about some of the problems -- I  
7 put dysfunctionalities up there -- that result -- Diane and  
8 Susan both mentioned the fact that, if there were better  
9 alternatives available, then some of these things might not  
10 happen, and I think we need to explore that tomorrow.

11           What I'll do is I'll type up these problems that we  
12 have talked about today for a hand-out tomorrow so that we can  
13 proceed to discuss them, to see what the extent of the problem  
14 is and a potential solution.

15           We've heard a lot of suggestions about solutions, so  
16 we've covered a wide range of issues today.

17           ROISMAN: Would you also type up the sort of -- at  
18 least the tentative draft rewrite of Ellen's proposals just in  
19 one place so people can look at it again and see do they agree  
20 with that or not?

21           CAMERON: I'll type up something that is -- I'll put  
22 all of that in for tomorrow, and I think if we can -- I think  
23 we had a necessary discussion about a lot of issues today, and  
24 maybe tomorrow we can put a finer point on some of these things  
25 and be more specific.

1           Jay and Larry, final comments, and just let me go to  
2 the audience to see if there's anything out there, since we're  
3 about ready to adjourn.

4           Jay?

5           SILBERG: In responding to a couple of things that  
6 Tony said, are there solutions that don't involve the  
7 Commission. Yeah. Whenever we can, we use them.

8           In DFS, the local landowners came in armed for bear,  
9 lots of resources, but they were willing to sit down and tell  
10 us what their problems were, and we settled with them. They  
11 dropped out of the hearing. They're now in support of the  
12 project.

13           We tried to do the same thing with Diane's client.  
14 They don't want to talk to us.

15           When you have a party that says over my dead body,  
16 terms and conditions, none, you know, you can't have a solution  
17 that's outside the scope of the Commission.

18           ROISMAN: I'm talking about procedural solutions.

19           SILBERG: We'd be happy to talk about procedural  
20 solutions or substantive solutions.

21           BOLLWERK: I always encourage the parties to settle.

22           [Laughter.]

23           SILBERG: When you have parties for whom it becomes a  
24 religious issue, as opposed to a substantive issue, if you  
25 will, there doesn't seem to be any common ground.

1           I would love for there to be common ground. I would  
2 love for there to be a procedural out, another route. We've  
3 been able to accomplish that in a number of cases, but it's  
4 just not always the case.

5           CURRAN: It doesn't have to be a religious issue for  
6 someone to feel strongly about it.

7           ROISMAN: I always thought it was the utilities that  
8 had the religious, that when God said let there be light, it  
9 was a utility executive that flipped the switch.

10          CAMERON: All right, Jay. Anything else?

11          SILBERG: In terms of genericizing, I think that the  
12 more generic resolutions to issues we have, the better off  
13 everyone is, because yes, you don't know if you are going to  
14 have a plant in your back yard, but everybody in the country  
15 knows that there's an issue that's now on the table, and if  
16 they are interested in it, you know, they ought to be able to  
17 participate, and yes, there may be some people who will  
18 participate unnecessarily, but I don't think that's really been  
19 the case. The folks who are going to be upset know who they  
20 are, and they're going to be upset regardless.

21          And in terms of the multiple bites at the apple, I  
22 think we have to bear in mind that the purpose of the NRC is  
23 public health and safety. It's not a game of seeing, you know,  
24 whose license we can grant or deny, but it's having the public  
25 health and safety protected.

1           And to say that you can't -- if a problem comes up in  
2   a staff review, that we can't amend the application and change  
3   the design to cure a problem that the staff had pointed out or  
4   to do the same if it's a problem that the intervenors have  
5   pointed out in a hearing, I think, is warping the process and  
6   why the NRC is here.

7           The NRC is not here to give lawyers on both sides the  
8   opportunity to expand their litigation skills. It's to protect  
9   the safety of the public, and I think we need to bear that in  
10  mind. It's not a game.

11           CAMERON: Okay.

12           Quick comment from Susan, last word to Larry.

13           We are going to discuss these issues again tomorrow,  
14  hopefully with some results.

15           Susan?

16           HIATT: I guess I would touch on what Jay talked  
17  about, finding common ground, and the reluctance of some people  
18  to do that.

19           I guess I'm reminded of an article that I saw with  
20  the title of "Will He Talk and Other Thought Pollutants," and  
21  common ground is one of those in there, and it was a place to  
22  meet after you alone have handed over your sword, and I think  
23  there's a perception among some people that that's what that  
24  involves, finding common ground, that you've given up your  
25  sword, like what's in 10 CFR 2, and maybe that's why they're



1       reluctant to do that.

2               CAMERON: All right.

3               Larry.

4               CHANDLER: Tony had suggested or at least asked  
5 whether there's any foundation to what he recalls having heard.  
6 I'm not aware of any statutory requirement or regulatory  
7 provision that prevents the Commission from denying a license.

8               In the material area, we have at least one pending  
9 denial proceeding underway. In the reactor area, they're  
10 practical issues. Where the staff identifies technical  
11 deficiencies, it certainly can deny a license.

12              There have been a number of facilities at which --  
13 let me back up. There have been a number of applications for  
14 facilities, in connection with which the staff questions have  
15 caused the applicant to rethink the advisability of their  
16 proposal, and they have been withdrawn.

17              ROISMAN: I think my point was can you tell them no  
18 and they can't ever come back with it again, and the answer is  
19 I don't think you can.

20              CHANDLER: You can deny the application. The initial  
21 application itself has been denied. You wouldn't foreclose  
22 them, obviously, from coming back. The APA doesn't contemplate  
23 that either, as far as I can tell.

24              ROISMAN: Right. I didn't mention it to suggest that  
25 it shouldn't be allowed, and I understood why it was. I

1 mentioned it to indicate where a lot of delay comes in the  
2 process is you go -- I mean in Comanche Peak, we went to a  
3 certain point and the utility basically said we're going to  
4 stand still for a while, and they stood still for a while.

5 So, if you look at start date and end date in  
6 Comanche Peak, you'd say, wow, that took a long time to  
7 license.

8 CHANDLER: And there are any number of cases like  
9 that, in which utilities have sort of gone back for any number  
10 of reasons. Comanche was one set of reasons; Diablo Canyon was  
11 another set of reasons.

12 RICCIO: Good reasons, too.

13 CHANDLER: They were good reasons. Absolutely, they  
14 were good reasons, and the process -- even the hearing process,  
15 not only the staff review, but the hearing process.

16 GRAY: George Edgar points out that the NRC can deny  
17 an application with prejudice. The NRC could find, for  
18 example, that a proposed site is no good. You can't amend the  
19 application to fix it. I mean that can be done. I don't know  
20 that it has been done up to now with regard to a nuclear power  
21 plant.

22 CAMERON: Larry, did you want to make one final  
23 comment?

24 CHANDLER: I would bring that to the attention of the  
25 Los Angeles Water & Power people and ask them about Malibu.

1 CAMERON: I guess this is where I've got get into  
2 this, case management.

3 CHANDLER: From an agency standpoint we, too, are as  
4 interested as others in any settlement of a proceeding.  
5 Litigation is not necessarily the answer to everything.

6 CAMERON: That's a great closing remark from the NRC.  
7 Is there anybody out in the audience who's left  
8 standing?

9 Bob, state your name and affiliation for the  
10 transcript, please.

11 TEMPLE: Bob Temple, a partner with Hopkins & Sutter.  
12 A quick note possibly for your board is to add fast-  
13 track procedures where appropriate, where risk-informed reviews  
14 suggest it's appropriate.

15 It's an answer to delay under certain circumstances  
16 where it would be inappropriate to be holding up a particular  
17 activity because of an intervention or a particular motion.

18 CAMERON: And when you say it would be inappropriate  
19 to be holding it up, it would be inappropriate because of the  
20 types of things that Tony Thompson was saying, low-risk, or  
21 inappropriate for some other reason?

22 TEMPLE: Either low-risk or procedurally  
23 inappropriate.

24 CAMERON: Okay. We'll put that on the list, and I  
25 just thank you all for staying with us today, and we'll see

1 most of you back tomorrow, and we'll have some materials for  
2 you tomorrow morning to make the discussion a little bit  
3 easier, and we'll start at 8:30. Thank you.

4 [Whereupon, at 5:27 p.m., the meeting was recessed,  
5 to reconvene at 8:30 a.m., Wednesday, October 27, 1999.]  
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